CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~307.~~ 56.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, AND STELLA BAHAM MEAD, TRUSTEES, &c., ET AL., PLAINTIFFS IN ERROR,

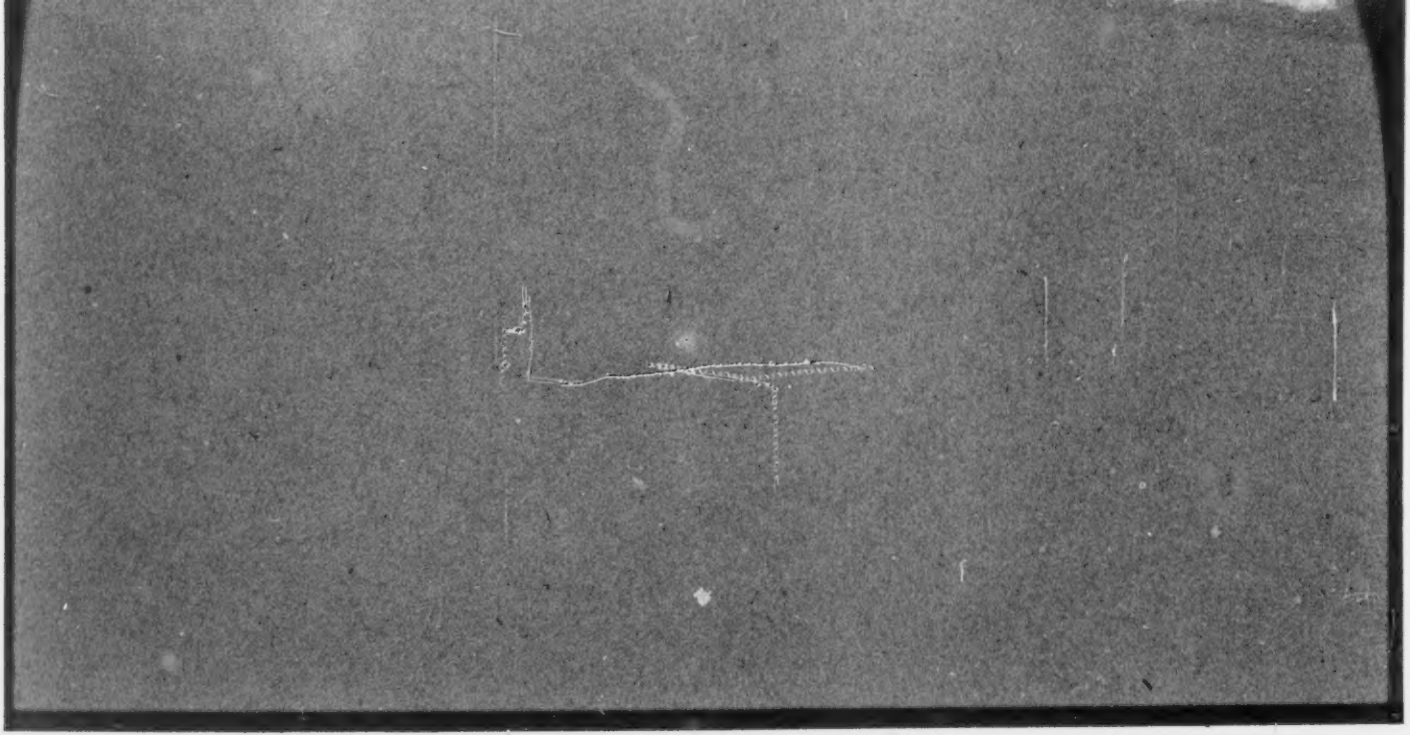
vs.

THE CITY OF PORTLAND ET AL

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED JUNE 29, 1904.

(19,407.)



(19,407.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 307.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, AND STELLA BAHAM MEAD, TRUSTEES, &c., ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF PORTLAND ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

INDEX.

	Original.	Print.
Return to writ of error	1	1
Writ of error	2	1
Petition for writ of error	6	3
Order allowing writ of error	9	4
Bond on writ of error	10	5
Citation	14	7
Acceptance of service of citation	15	8
Assignment of errors	17	8
Abstract of record (in lieu of transcript)	19	10
Amended complaint	19	10
Demurrer	44	24
Decree and notice of appeal	44	25
Undertaking on appeal	45	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 11, 1904.

	Original.	Print
Assignment of errors	47	27
Appendix: Statement as to complaint	47	27
Statement as to demurrer to complaint	47	27
Opinion on demurrer	48	27
Endorsement on abstract	65	37
Stipulation as to abstract	65	38
Opinion	67	38
Decree	78	46
Waiver of right to petition for rehearing	80	47
Clerk's certificate	81	47

1 In the Supreme Court of the State of Oregon, *ss:*

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESley Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeannette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Plaintiffs and Appellants,

vs.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Defendants and Respondents.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

2 In the Supreme Court of the United States.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Plaintiffs in Error,

v.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon before you or some of you, being the highest court of said State in which a decision could be had in the said action between Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of

Stephen Mead, deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, plaintiffs and appellants, and plaintiffs in error, and The City of Portland, W. C. Elliott, city engineer of the city of Portland, A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, constituting the board of public works of the city of Portland, defendants and respondents, and defendants in error, wherein was drawn in question
3 the construction of a statute of the United States, and the decision was against the title, right, privileges, and exemption specially set up and claimed under such statute; a manifest error hath happened to the great damage of the said Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, plaintiffs in error, as by their complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of April, 1904.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. H. MARSH,
Deputy Clerk.

Allowed by
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

STATE OF OREGON, } ss:
County of Multomah. }

4 Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon, this 2 day of May, 1904.

L. A. McNARY,
Of Attorneys for Defendants in Error.

STATE OF OREGON, } ss:
County of Marion, }

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Salem, Oregon, this 2nd day of May, 1904.

J. J. MURPHY,
Clerk of the Supreme Court of Oregon.

5 [Endorsed:] No. — In the Supreme Court of the U. S. *for the county of* —— Dept. No. — Joshua Roberts Mead *et al.* plaintiffs in error, *vs.* City of Portland *et al.* defendants in error. Writ of error Filed May 2nd 1904 J. J. Murphy, clerk by —— deputy Carey & Mays, of attorneys for pl'ffs in error.

6 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeannette Meier, Fannie Frank, Julius L. Mei-r, and A. Meier, Appellants,

v.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

To the Hon. Frank A. Moore, chief justice of the supreme court of the State of Oregon:

Now come Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, appellants, by C. E. S. Wood, S. B. Linthicum, J. C. Flanders, and Carey & Mays, their attorneys, and say, that on or about the 18th day of April, 1904, the said supreme court of the State of Oregon rendered and entered a decree in the above entitled cause in favor of the above named respondents and defendants and against the above named appellants, as will appear by reference to the record and proceedings in the said cause, in which decree and decision, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the plaintiffs and appellants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs and appellants pray that a writ of error issue in this behalf, returnable unto the Supreme Court of
7 the United States, for the correction of errors complained of, and that a transcript of the record, proceedings, and papers

in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

C. E. S. WOOD,
S. B. LINTHICUM,
J. C. FLANDERS,
CAREY & MAYS,
Attorneys for Petitioners.

Due and legal service of the foregoing petition for writ of error is hereby accepted, at Portland, Oregon, this 2 day of May, 1904.

L. A. McNARY,
Of Att'ys for Respondents.

8 [Endorsed:] No. — In the supreme court of the State of Oregon, for the county of —— Dep't No. — Joshua Roberts Mead *et al.* plaintiffs, *vs.* City of Portland *et al.* defendants. Petition for writ of error Filed May 2nd 1904 J. J. Murphy clerk, by —— —— deputy. Carey & Mays, of attorneys for pl't'ffs.

9 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

v.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Order Allowing Writ of Error.

On this 30 day of April, 1904, came the plaintiffs and appellants by their attorneys and filed herein and presented to the court their petition, praying for the allowance of a writ of error intended to be urged by them; praying also that a transcript of the record and proceedings and papers upon which the decision and decree herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and such other and further proceedings may be had as may be proper in the premises:

On consideration whereof, the said writ is hereby allowed upon the said plaintiffs and appellants giving bonds according to law in the sum of $500.00.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] In the supreme court of the State of Oregon. Joshua Roberts Mead, *et al.* plaintiffs *vs.* City of Portland, *et al.*, defendants. Order allowing writ of error. Filed May 2 1904. J. J. Murphy clerk, by —— —— deputy. Carey & Mays, of attorneys for pl't'ffs.

10 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

v.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Know all men by these presents, that Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, the plaintiffs in error in the above entitled cause, on writ of error to the Supreme Court of the United States, as principals, and Peter Kerr and W. H. Dunckley as sureties, are held and firmly bound unto the said City of Portland, W. C. Elliott, city engineer of the city of Portland, A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, constituting the board of public works of the city of Portland, defendants and respondents in the supreme court of the State of Oregon and defendants in error on the writ of error to the Supreme Court of the United States, in the full sum of $500.00, to be paid to the said City of Portland, W. C. Elliott, city engineer of the city of Portland, A. L. Mills, Richard Williams, Wil-
11 liam Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, constituting the board of public works of the city of Portland, their certain attorneys, executors, administrators, and assigns, to *the* which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 30th day of April 1904.

Whereas, late[1]*y* at the session of the supreme court of the State of Oregon, in an action pending in the said court, between Joshua Roberts Mead, Anna Leocadie Mead, William Wesley Mead and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, as plaintiffs and appellants, and The City of Portland, W. C. Elliott, city engineer of the city of Portland, A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, constituting the board of public works of the city of Port-

land, as defendants and respondents, a final decree was rendered against the said plaintiffs and appellants, and they, the said plaintiffs and appellants, having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said supreme court of the State of Oregon, to reverse the decree in the aforesaid suit, and a citation directed to the said defendants and respondents, citing and admonishing them, and each of them, to be and appear at a session of the Supreme Court of the United States, at Washington, within sixty days from the date hereof:

Now, therefore, the condition of this obligation is such that if the said Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, plaintiffs in error, shall prosecute the said writ of error to effect, and shall answer all costs, if they shall fail to make their said plea good: then, this obligation to be void; else to remain in full force and virtue.

JOSHUA ROBERTS MEAD,
ANNA LEOCADIE LEE,
WILLIAM WESLEY MEAD,
STELLA BAHAM,
Trustees under the Last Will of Stephen Mead, Deceased,
By WILLIAMS, WOOD & LINTHICUM,
Their Attorneys.

JEANETTE MEIER,
FANNIE FRANK,
JULIUS L. MEIER, AND
A. MEIER,
By CAREY & MAYS, *Their Attorney.*
PETER KERR. [SEAL.]
W. H. DUNCKLEY. [SEAL.]

Signed, sealed and delivered in the presence of us as witnesses:
ALBERT E. GEBHARDT.
H. H. PARKER.

Approved,
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

STATE OF OREGON, }
County of Multnomah, } ss:

I, Peter Kerr and I, W. H. Dunckley, whose names are subscribed to the within undertaking as sureties, being duly sworn, each for myself, say: That I am a resident and freeholder within the State of Oregon, and am not an attorney or councillor at law, sheriff, clerk, or officer of any court: and am worth the sum of $500.00 over and

above all debts and liabilities and exclusive of property exempt from execution.

PETER KERR.
W. H. DUNCKLEY.

Sworn and subscribed before me this 30th day of April 1904.

[SEAL.] ALBERT E. GEBHARDT,
Notary Public in & for Oregon.

13 (Endorsed:) No. —. In the supreme court of the State of Oregon, Joshua Roberts Mead, *et al.* plaintiffs *vs.* City of Portland, *et al.*, defendants. Undertaking. Filed May 2nd 1904 J. J. Murphy, clerk. By —— —— deputy. Carey & Mays, of attorneys for pl'tffs.

14 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

v.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

To the City of Portland, W. C. Elliott, city engineer of the city of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, constituting the board of public works of the city of Portland, respondents and defendants in error; and to L. A. McNary, city attorney, and J. P. Kavanaugh, your attorneys, Greeting:

Whereas, Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meir, and A. Meier, appellants, as plaintiffs in error, have lately obtained a writ of error to the Supreme Court of the United States from a decree rendered in the supreme court of the State of Oregon, in your favor, and have given the security required by law, you, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to said writ of error wherein said Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the
15 last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, are plaintiffs in error

and you are defendants in error, to show cause, of any there be, why the decree rendered against the said plaintiffs in error as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Frank A. Moore, chief justice of the supreme court of the State of Oregon, this 30 day of April, 1904.

[Seal Supreme Court, State of Oregon.]

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest: J. J. MURPHY, *Clerk.*

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 2 day of May, 1904.

L. A. McNARY,
Of Attorneys for Defendants in Error.

16 [Endorsed:] No. — In the supreme court, of the State of Oregon, for the county of —— Dep't No. — Joshua Robert Mead *et al.* plaintiffs, *vs.* City of Portland *et al.* defendants. Citation Filed May 2nd 1904 J. J. Murphy clerk. by —— —— deputy. Carey & Mays, of attorneys for pl't'ffs

17 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

v.

CITY OF PORTLAND, W. C. ELLIOTT, Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Assignment of Error on Writ of Error to the Supreme Court of the United States.

Now at this time come Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, plaintiff- and appellants in the above entitled cause, and plaintiffs in error to the Supreme Court of the United States, by their attorneys, and present the following assign-

ment of errors and prayer for reversal of decision in the above entitled cause in this court by the Supreme Court of the United States:

(1.) The supreme court of the State of Oregon erred in sustaining the demurrer to the complaint herein and not overruling the said demurrer.

(2.) The supreme court of the State of Oregon erred in awarding a decree in favor of the defendants and against the plaintiffs, and in not awarding a decree against the defendants and in favor
18 of the plaintiffs.

(3.) The supreme court of the State of Oregon erred in holding that the city of Portland, its officers and agents, are entitled to proceed, without tendering or offering to the plaintiffs any compensation therefor, to close the opening in the approach to the Morrison Street bridge.

(4.) The supreme court of the State of Oregon erred in holding that the threatened acts of the defendants and respondents in closing the opening in the approach of the Morrison Street bridge are lawful, and will not deprive the plaintiffs and appellants of vested property rights without due process of law, contrary to the XIV amendment to the Constitution of the United States.

(5.) The supreme court of the State of Oregon erred in holding that the threatened acts of the defendants and respondents do not impair the obligation of contract rights of the plaintiffs and appellants, protected by section 10 of article I of the Constitution of the United States.

And by reason of the foregoing errors and holdings, the appellants pray that the said decree may be reversed and that a mandate be issued, directing that a decree be entered in favor of the plaintiffs and appellants, being the plaintiffs in error in the said writ, and for costs and disbursements, and that they may be restored to all things which they have lost by reason of said decree.

CAREY & MAYS,
Of Att'ys for Pl't'ffs and Appellants and Plaintiffs in Error.

Due and legal service of the foregoing assignment of error is hereby accepted at Portland, Oregon, this 2 day of May 1904.

L. A. McNARY,
Of Att'ys for Def'ts and Respondents and Defendants in Error.

19 (Endorsed:) No. —. In the supreme court, of the State of Oregon, Joshua Roberts Mead, *et al.*, plaintiffs, *vs.* City of Portland, *et al.*, defendants, Assignment of error. Filed May 2nd 1904. J. J. Murphy, clerk. By —— ——, deputy. Carey & Mays, of attorneys for pl't'ffs.

Abstract in Lieu of Transcript.

In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of *Stephen Mead, Deceased*; *Jeannette* Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

vs.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of The City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Appellants' abstract.

That heretofore, on the 8th day of July, 1903, an amended complaint was filed in the office of the clerk of the circuit court, in and for the county of Multnomah, which omitting the verification and title of court and cause, is as follows:

Now come the above named plaintiffs and for their amended complaint, by leave of the court obtained, for cause of suit against the above named defendants allege:

That defendant, The City of Portland, is a municipal corporation within the State of Oregon, incorporated under and by virtue of an act of the Legislative Assembly of the State of Oregon, entitled "An act to incorporate the city of Portland, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the secretary of state October 17, 1898.

That defendant, W. C. Elliott, is the duly elected, qualified and acting city engineer of the city of Portland.

That the defendants, A. L. Mills, Richard Williams, Wm. McMaster, A. H. Breyman and C. A. Cogswell, are each duly appointed, qualified and acting members of the board of public works of the city of Portland, and together with said defendant, W. C. Elliott, constitute the board of public works of said city of Portland.

That plaintiffs, Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead and Stella Baham Mead, as trustees under the last will of Stephen Mead, deceased, are, and for a number of years last past have been, the owners in fee and in possession of block 76, in said city of Portland, together with all the improvements thereon, and all the wharf, riparian and water rights and privileges thereunto belonging.

That plaintiffs, Jeannette Meier, Fannie Frank and Julius Meier, are, and for a number of years last past have been the owners in fee and in possession of the south half of block 77, in said city of

Portland, comprising lots 3 and 4, in said block, together with all the improvements thereon and the wharf, riparian and water rights and privileges thereunto belonging.

That said block 76 and the south half of block 77 are bounded on the west by Front street and on the east by the Willamette river. The north boundary line of said block 76 is the south side line of Morrison street and the southern boundary of said
21 south half of block 77 is the north side line of said Morrison street.

That said properties of plaintiffs are valuable for business purposes and there are attached thereto valuable riparian and wharf rights and privileges entitling the owners thereof to build, maintain and use the same extending to the established wharf line of said river in front of said property.

That on the west end of said block 76 and of said south half of block 77, there are large and valuable brick buildings and on the east end of said block 76 and said south half of block 77 are situated warehouses, docks and wharves which are occupied by the tenants of their respective owners.

That said wharves, docks and warehouses on the east end of said block 76 and on the east end of said south half of block 77 are of great value.

That in the dedication by Daniel H. Lownsdale of the plat of the town of Portland, recorded in the records of Multnomah county on about, to-wit, December 16, 1852, and which said plat includes all that portion of Morrison street between said Front street and running east to the Willamette river, it is, among other things, provided as follows:

"The wharves and wharfing privileges are specially reserved to the owners of the claim, and never (except by deed) subject to any but the laws of the Territory of Oregon or ordinances of the town or city corporation, as other town (private) property."

That said block 76 and the south half of block 77 are located within said Daniel H. Lownsdale donation land claim, and plaintiffs as to their respective properties are claimants and owners under said Daniel H. Lownsdale and are owners of said wharves and
22 wharfing privileges in front of their respective properties.

That the common council of said city of Portland adopted an ordinance, No. 2273, entitled, "An ordinance authorizing the construction of a wharf in the Willamette river in front of and opposite lots number- 3 and 4, in block No. 77," approved September 26, 1878, which said ordinance is as follows:

The city of Portland does ordain as follows:

SECTION 1. The owner or owners of lots 3 and 4, in block 77, in the city of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front street from a point 100 feet north of the north line of Morrison street, the lower floor of said wharf to

be as near ten feet above the base of grades as practicable; provided, that the owner or owners of said above described property shall construct and maintain at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison street and to be in accordance with plan on file in the office of the auditor and clerk.

SECTION 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway, 15 feet in width along and over the north side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend southwardly into said street
23 for a greater distance than six feet; provided, that the whole of said passageway and all of those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and, provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

SECTION 3. The owners of the property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in ordinance No. 1140, entitled, "An ordinance providing for the prevention of fires and the protection of property endangered thereby," and the several amendments thereto to the contrary notwithstanding."

That said common council of said city of Portland passed an ordinance, No. 2387, entitled, "An ordinance authorizing the construction of a wharf in the Willamette river in front of and opposite lots Nos. 3 and 4, in block No. 76," approved February 21, 1879, which said ordinance is as follows:

"The city of Portland does ordain as follows:

"SECTION 1. The owners of lots 3 and 4, in block 76, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river on and in front of the above described lots. The easterly line of said wharf to commence at a point 147 feet east of the east line of Front street and running from the center line of Morrison street extended in a direct course to a point 130 feet south of the center line of Morrison street, extended at a distance of 137½ feet from the east line of Front street.

"The lower floor of said wharf to conform to the grade
24 of Coulter and Church's wharf at its connection therewith; provided, that the owner or owners of the above described property shall construct and maintain at their own expense a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan in auditor's office.

"SECTION 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block northwardly, except for a passageway, 15 feet in width, along and over the south side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet, said passageway shall not extend northwardly into said street for a greater distance than six feet; provided that the whole of said passageway, and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and, provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"SECTION 3. The owners of property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in ordinance No. 1140, entitled, 'An ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments thereto, to the contrary notwithstanding."

That at the time of the adoption and approval of said ordi-
25 nance, C. P. Church and Julia Church, his wife, were the owners in fee of an undivided one-half, and Samuel Coulter was the owner of an undivided one-half of said lots 3 and 4 in block 77.

That the wharf of Coulter and Church, referred to in said ordinance, is the same wharf referred to in the preceding ordinance No. 2273, which was erected pursuant to said ordinance in front of said lots 3 and 4, in said block 77, and on and over said north half of Morrison street.

That under and in pursuance of said ordinance the respective predecessors in interest of plaintiffs in and to the property aforesaid constructed wharves in conformity with the provisions of said ordinances and the grades therein established, the said wharf constructed pursuant to said ordinance No. 2387, covering the south half of said Morrison street, being constructed over and on the south half of said Morrison street, and on the east end of said block 76, as provided in said ordinance; and the wharf constructed pursuant to said ordinance No. 2273 extending over and covering the north half of said Morrison street and on the east end of said south half of said block 76.

And plaintiffs herein and their predecessors in interest have, at all times, respectively complied with and conformed to the provisions of said ordinances.

That said wharves so constructed on the east ends of said blocks consist of two floors of stories and upon the second story of each of said wharves the respective owners of said property constructed large warehouses, and the portions of said wharves on and over Morrison street being on a level with said lower wharves on the east end of said blocks 76 and 77.

26 That said second stories or upper floors of each of said wharves were built slightly above the level of said Front street with approaches thereto, as provided in said ordinances.

That the lower stories or floors of said wharves were considerably below the level of said Front street, and were connected with Front street by a roadway running on an incline along said Morrison street from Front street down to the portion of said wharves so built on said Morrison street, which said roadway was constructed by the respective owners of said block 76 and the south half of block 77.

That said wharves, docks and warehouses and said approach thereto from Front street have been constructed, maintained and used for more than 20 years by plaintiffs and their respective predecessors in interest and their tenants, and at all of said times said wharves and docks, constructed in pursuance of said ordinances have been used as landing places for boats and vessels navigating the waters of the Willamette river and by people and teams having business at said docks or wharves, and in addition thereto said docks and wharves, upon and over said Morrison street and said approach thereto from Front street so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public.

And these plaintiffs further aver that the grade of said Morrison street as to that portion thereof occupied by said roadway leading from Front street and over that portion of said street upon which said wharves and docks were built has never been established, otherwise than in and by said ordinances, and said portions of said Morrison street so occupied by said wharves and said roadway
27 have been and are now improved and used as and the same are a public street and highway.

That said wharf over and on said Morrison street and said roadway leading thereto from said Front street facilitated travel on said portions of Morrison street and contributed to the convenience of landing from boats and vessels and were constructed and have since been maintained with that end in view as well as a means of access to plaintiffs' said properties.

That during at least the greater portion of every year boats and vessels have made their landings and discharged and received their freight and passengers on the lower floor of said docks.

That the use of said wharves and the lower floors thereof enhance greatly the value of said property so owned by plaintiffs.

That said wharves, docks and warehouses, built upon and in front of said plaintiffs' property and on and over Morrison street and said approach from said Front street to said wharves and docks were built and have been maintained and used by the predecessors in interest of plaintiffs and by plaintiffs in reliance upon the rights and privileges therein conferred.

That the Legislative Assembly of the State of Oregon passed an act, approved October 18, 1878, entitled, "An act to authorize the construction of a bridge on the Willamette river between the city of

Portland and the city of East Portland, in Multnomah county, State of Oregon," which said act is as follows:

Be it enacted by the Legislative Assembly of the State of Oregon:

SECTION 1. That it shall be lawful for the "Portland Bridge Company" a corporation duly incorporated under and in conformity with the laws of the State of Oregon, or its assigns, and that

28 said corporation, or its assigns, be and are hereby authorized and empowered to construct, build and maintain, use, or cause to be constructed, built and maintained or used, a bridge across the Willamette river between Portland and East Portland, in Multnomah county, State of Oregon, for any and all purposes of travel or commerce, said bridge to be erected at any time within six years after the passage and approval of this act, at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation, or its assigns, on or above Morrison street of said city of Portland and in street- of said city of East Portland, the same to be deemed a lawful structure; provided that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hunded feet in the clear in width of a passageway, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge; and provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland.

SECTION 2. That said corporation, or its assigns, are hereby authorized and empowered to make such rules and regulations for the care, maintenance and use of said bridge as it may seem to be just and reasonable. That the county court of Multnomah county is hereby authorized to fix, alter and establish the rates from time to time of toll to be charged by such bridge corporation.

SECTION 3. That on the filing of the acceptance of the terms

29 of this right by said corporation, in the office of the secretary of state, signed by its president and attested by its secretary, and the entrance upon construction of the said bridge in good faith by said corporation, or its assigns, this shall be deemed a vested granted franchise.

SECTION 4. All acts or parts of acts, either general or special, so far as they to any extent conflict with this act, are hereby repealed. Owing to the great necessity for the construction of the aforesaid bridge at the earliest practicable time, this act shall be in force from and after its approval by the governor.

That long after the construction of said docks and wharves and warehouses over said Morrison street and said approach thereto from said Front street, and after they had been maintained and in use for many years, as aforesaid, said Portland Bridge Company, or its successors in interest, commenced the construction of and constructed, about the year 1886, a bridge between said Portland and

said East Portland, the west end of which bridge was located at the east end of said Morrison street and between the west end of said bridge and said Front street; also constructed a plank road or approach to said bridge over said Morrison street, extending over a part of said Morrison street from said west end of said bridge to said Front street, but said approach did not conform to the grade of said Front street, but was constructed at an elevation of more than two feet above such grade, at the west end of said bridge, and thence inclined to said Front street, and has never been upon the grade of Front street, but has always been maintained at the elevation aforesaid.

That said approach did not, however, cover the whole of said Morrison street from said Front street to said west end of said
30 bridge, but said approach was so constructed that a portion of said Morrison street, in the center thereof, and leading from said Front street on an incline to said lower docks and wharves so built and maintained by plaintiffs and their predecessors in interest and used by them and the public, was left uncovered and unchanged and with its original grade unchanged, the same being about 18 feet wide and extending easterly from Front street about 95 feet.

That said approaches to said bridge on said Morrison street as constructed by said Portland Bridge Company and successors have been and now are sufficient approaches for the passage to and from on said bridge of foot passengers, cars and vehicles using the same.

That said opening so left in said decking of Morrison street was for the purpose of enabling persons and vehicles to use said roadway running as aforesaid to the lower floors of said wharf, which said roadway has for more than twenty years been maintained by plaintiffs and their predecessors in interest and used by vehicles and teams as a means of ingress and egress to and from said wharfs and docks built and maintained under said ordinances and for the passage of freight and passengers to and from boats and vessels landing at wharves and as a highway for the use of the public. And said opening was so constructed that it permitted the passage of teams, vehicles and persons under said approach to said bridge and did not materially interfere with or obstruct the use of said roadways and said wharfs or docks as they had theretofore been used, or the access thereto.

That the Legislative Assembly of the State of Oregon passed an act, entitled, "An act to authorize the cities of Portland, East
31 Portland and Albina to construct, purchase or acquire by condemnation, or other means, one or more bridges across the Willamette river, between the city of Portland and the city of East Portland, in Multnomah county, Oregon, which bridge or bridges shall be free to all pedestrians and all classes of vehicles and traffic, except railways and street railways." Which said act was filed in the office of the secretary of State on February 18, 1891.

Section 24 of said act of February 18, 1891, provides as follows:

"The committee, so long as it shall continue to exist, and the commission when selected, shall have the right to appropriate and condemn to the uses aforesaid any private real property, bridge, ferry, approach to bridge or ferry, or riparian rights for the general use of the people of the cities of Portland, East Portland and Albina, and the same may be entered upon, examined, surveyed and selected in the mode prescribed by the statutes of this State for the appropriation of land for corporate purposes, and thereafter the committee or commission, as the case may be, seeking to make such appropriation may proceed in the manner prescribed by said statutes to have such property appropriated and the compensation therefor determined and paid, and not otherwise, except that the compensation may be paid by the deposit in court of an order duly drawn upon the treasurer of said committee or commission for the amount of such compensation."

That, thereafter, the Legislative Assembly of the State of Oregon passed an act, approved February 21, 1895, entitled: "An act to authorize the city of Portland, in the county of Multnomah, State of Oregon, to acquire by purchase or by appropriation or
32 condemnation, under the eminent domain laws of the State of Oregon, the Morrison Street bridge, together with all the franchises and property connected therewith, situated over and across the Willamette river at Portland, Multnomah county, Oregon, and to acquire by purchase or by condemnation, as aforesaid, the Stark Street ferry across the Willamette river at Portland, aforesaid, together with the approaches to such ferry, ferry slips, and all rights and franchises pertaining thereto, including all boats and other property used, owned or operated in connection with said ferry or belonging thereto, and to issue bonds in payment thereof, and to authorize the city of Portland to lease the upper deck of the steel bridge constructed across the Willamette river by the Oregon Railway & Navigation Company, at Portland aforesaid, and to provide by taxation for paying the rental of the same and interest on said bonds, and to appoint a commission to carry into effect the provisions of this act, and declaring an emergency; and to authorize, empower and direct the bridge commission of the city of Portland to turn over, surrender and deliver to the county court of Multnomah county all the bridges, ferries and property under the control and supervision of the said bridge commission, and requiring said county court of Multnomah county to assume the management, control and supervision thereof, and to authorize, in certain cases, the fixing of tolls on traffic over the bridge and ferries to be acquired, and bridges and ferries now and heretofore owned and operated by the city of Portland, and to repeal an act, entitled, "An act to authorize the cities of Portland, East Portland and Albina to construct, purchase or acquire, by condemnation or other means, one or more bridges across the Willamette river between the city of Portland and the city of East Portland, in Mult-

nomah county, Oregon, which bridge or bridges shall
33 be free to all pedestrians and all classes of vehicles and traffic, except railways and street railways,' filed in the office of the secretary of state Febru[illegible]y eighteenth, eighteen hundred and ninety-one, and to repeal an act entitled, 'An act to authorize the bridge committee and the bridge commission, created and provided for in the act filed in the office of the secretary of state February eighteenth, eighteen hundred and ninety-one, entitled, "An act to authorize the cities of Portland, East Portland and Albina to construct, purchase or acquire, by condemnation or other means, one or more bridges across the Willamette river, between the city of Portland and the city of East Portland, in Multnomah county, Oregon, which bridge or bridges shall be free to all pedestrians and all classes of vehicles and traffic except railways and street railways; and to acquire, establish and operate a free ferry," filed in the office of the secretary of state February twenty-second eighteen hundred and ninety-three.

"SECTION 1. That Sol. Hirsch, N. K. West and J. V. Beach, all of the city of Portland, county of Multnomah and State of Oregon, are hereby appointed bridge committee of the city of Portland, and they and their successors in office are hereby authorized to act as a board, which shall be styled the bridge committee of the city of Portland, for the purpose of this act, and the said board are hereby authorized, empowered and directed, in the name of the city of Portland, to procure by purchase or condemnation proceedings, as provided in this act, the Morrison Street bridge, which is now constructed over and across the Willamette river, from the foot of Morrison street, on the west side of the river, to East Morrison street, on the east side of the Willamettee river.....

.....

34 The said bridge committee, for the purpose of carrying into effect this act, is hereby authorized and empowered, if by said bridge committee deemed necessary, to appropriate and condemn, in the name of the city of Portland, to the use of the public, the said Morrison Street bridge, and any and all franchises, easements, lines, approaches, structures, superstructures, leases, railway tracks, railway wires and roadways..... .....

.....

"SECTION 16. Whenever, and as soon as, the bridge committee has secured all of the bridges and ferry, which they shall acquire under this act, and the same are ready for use, the bridge committee is hereby required to turn the same over to the county court of Multnomah county, which is hereby required to accept and receive the same and operate the same as free bridges and ferry, and operate the same under similar conditions to those under which the other free bridges and ferries belonging to said city of Portland are operated, and which free bridges and ferries now, heretofore and hereafter belonging to said city of Portland, are by this act placed

under the jurisdiction and control of the said county court of Multnomah county.

"SECTION 17. The bridge committee, so long as it shall continue to exist, shall have the right to appropriate and condemn to the use of the public the Morrison Street bridge, and all the franchises, landings, approaches, structures, superstructures, railway lines, railway wires, ways, leases, railway tracks, contracts and property pertaining thereto.....

.....

and the power and authority is hereby especially conferred upon and granted to said city of Portland, acting by and through its said bridge committee, to condemn to the use of the public under the power of eminent domain, *and* (any) and all property, real, personal and mixed, of whatsoever kind or nature, necessary to carry into effect the provisions of this act, and in anywise relating to the said Morrison Street bridge, its franchise, approach, easements, rights or appurtenances, and any railway thereon.....

.....

"SECTION 26. In the event that the majority of the votes cast by the said qualified voters of said school district are cast for the charging of tolls on the bridges and ferries now owned by the city of Portland, it shall be the duty of the county court of Multnomah county, whenever the bridges and ferries owned and acquired heretofore by the city of Portland, as well as the bridges and ferry which may be owned and acquired under the provisions of this act, shall be turned over and transferred to the control and authority of said county court, as in this act provided, to estimate the amount of money which will be required for the maintenance, repair and operation of all such bridges and ferries, and said county court shall fix a rate or rates of toll thereupon for vehicles not to exceed five cents a single trip for vehicles drawn by one animal, and not to exceed ten cents a single trip upon vehicles drawn by more than one animal, and not to exceed two cents each for horses and cattle, and the money derived from said tolls shall be used to defray the expenses of maintaining operating and repairing said bridges and ferries. Whenever, in the judgment of said county court, the amount to be raised from said tolls will not be sufficient to defray the expense of operating, maintaining and repairing said bridges and ferries, the said county court shall provide a sum to be raised by taxation in addition to the amount so to be raised from said tolls, sufficient to make up the deficiency.....

.....

and from and after the taking effect of this act the county court of Multnomah county shall assume and take complete possession and control of the bridges and ferries owned and operated by the said city of Portland, or which may be acquired under the provisions of this act, and said county court of Multnomah county shall maintain and operate the same,.....

"SECTION 28. The county court of Multnomah county shall annually levy a tax upon all the taxable property within the county of Multnomah, sufficient, after deducting any revenues received from rentals and tolls upon such vehicles, if any such be collected, to pay the interest accrued and to accrue upon the bonds hereby authorized to be issued, and all bonds heretofore authorized to be issued for the purchase, construction and acquisition of bridges and ferries by the city of Portland, and to maintain and keep in good condition and repair during the ensuing year all the bridges and ferries now owned or acquired by the city of Portland, and the bridges and ferries to be leased, acquired and established as in this act contemplated, and to pay the annual rental for the upper deck of the steel bridge, which tax shall be levied and collected in manner and form as other taxes are levied and collected by Multnomah county."

That said bridge was purchased under and by virtue of said two acts last named of the Legislative Assembly of the State of Oregon.

That the conveyance evidencing such purchase bears date July 3, 1895, and is recorded at pages 55 *et seq.* of Book 226 of Records of Deeds of said Multnomah County, and is a general warranty deed wherein the Willamette Iron Bridge Company, a corporation organized under the laws of the State of Oregon, and the successor in interest of said Portland Bridge Company, was grantor and said City of Portland was grantee.

37 That the property which said The Willamette Iron Bridge Company purported to convey in and by said deed and to which said city of Portland claims title under said deed is described therein as follows:

"All the following described real and personal property situated in said city of Portland, in the county of Multnomah and State of Oregon, to wit:

"All of that certain bridge generally called and known as the Morrison Street bridge, spanning and operated over the Willamette river in said city of Portland, from Morrison street on the west side of said river to East Morrison street on the east side of said river, together with the landings, aprons and approaches of said bridge and the piers, foundation, structure, substructure and superstructure thereof, and all of the railway tracks, railways wires, and telephone wires situated thereon, and used in connection therewith, together with the fastenings and connections and the wires and electrical machinery used for operating the draw of said bridge, and all of the charter franchises, rights of way, easements, powers, privileges and authority, riparian rights and landings for the construction, maintenance and operation of said bridge and the taking of tolls thereon, including all of the rights, powers, privileges, immunities, authority and franchises granted and conferred by the act of the Legislative Assembly of the State of Oregon, approved October 18, 1878, entitled 'An act to authorize the construction of a bridge on

the Willamette river between the city of Portland and the city of East Portland, in Multnomah county, State of Oregon;' also, all of the office and office fixtures, including office safe, desks, office chairs, stove and other office furniture and fixtures, of said
38 party of the first part and said bridge, and all of the tools, chains, cables, ropes, lanterns, ladders, extra parts, spare parts, and materials designed for the construction, repair and maintenance of said bridge and the draw and machinery thereof, blocks and tackle, wheelbarrows, shovels, brooms, and all other tools, materials, fixtures, fittings, machinery and appurtenances used about or in connection with said bridge and belonging to said party of the first part.

"It being the intention to convey by this indenture to said party of the second part, all of the property of every name and nature owned, possessed and enjoyed by said party of the first part, and any property of the said party of the first part not herein specifically enumerated and described shall, nevertheless, by virtue of this indenture, be fully conveyed to and invested in the party of the second part, its successors and assigns, in all respects as though the same were specifically enumerated and particularly described herein."

That said approach to said bridge over said Morrison street from said Front street to said west end of said bridge, hereinbefore particularly referred to, is one of the approaches to said bridge mentioned in said act, and to which said city of Portland claims title under said deed.

That at the time of said purchase said portions of said Morrison street, so occupied by said docks and wharves and said roadway or incline leading from Front street thereto, were being and have been maintained and kept up by plaintiffs and their predecessors in interest and were and have been used by them and the public upon their original grade and without any change in such grade as a means of access to said lower docks or wharves and as a pub-
39 lic highway, and said portions of said approach to said bridge which were left uncovered when said approach was constructed, and which were uncovered at the time of said purchase, have remained since such purchase in such condition.

That the care and custody of said bridge and said approaches, according to the provisions of said acts as aforesaid, was assumed by said bridge committee and said bridge commission until the same were turned over by the provisions of said last mentioned act, to-wit, said act of 1895, to the county court of the State of Oregon for Multnomah county, which has since said time had the care, charge and maintenance of said bridge and the approaches thereto.

(That some time during the year 1886 the said Willamette Iron Bridge Company began the construction of the said bridge and built two piers in the Willamette river to support the western end of the structure within a few feet of and in front of the outer line of said wharves, and in such position as to obstruct the navigation of said river at that place, and to greatly interfere with the access to

the said wharves by boats and vessels plying the waters of said river, and so that the use of said wharves by such boats and vessels was rendered inconvenient and difficult; and at the same time the said Willamette Iron Bridge Company began to construct the approach to said bridge over Morrison street, and threatened to so construct the same as to greatly interfere with the access to the said wharves, to the great damage of the owners thereof.

That, thereupon, the owners of said wharves, on or about the 6th day of April, 1887, protested against the acts of the said Willamette Iron Bridge Company, and claimed that the said structures as so constructed were, and would continue to be, public nuisances
40 and illegal, and that the said owners of said wharves had a right to have the same abated and removed, and had a right so sue for and recover damages against the said company for the said injuries sustained by them.

That while the said controversy was pending and undetermined and in consideration of the agreement upon the part of the said wharf owners to waive their right to institute and commence suits and proceedings to protect their rights and to abate the said alleged nuisances and to enjoin the construction of the said structures in the manner threatened as aforesaid, a compromise and settlement was effected between said parties, whereby the said Willamette Iron Bridge Company agreed, on its part forever to leave the opening in said bridge approach substantially as it now is and ever since has existed, and whereby, in consideration thereof, and to settle and compromise the said matters in dispute, the said wharf owners agreed to permit, without objection, the said piers to remain as then constructed and as they have ever since remained, and to waive all objection to the construction of the said approach in the manner in which it was constructed, as aforesaid, leaving the said opening forever open and unobstructed for free ingress to and egress from the said wharves. That, accordingly, the said parties acted upon the said agreement and the said wharf owners forebore to begin or prosecute the said suits and legal proceedings.)

That some time about the year 1890, and while the said Willamette Iron Bridge Company was the owner and was in possession of the said bridge and the approach thereto on Morrison street, hereinbefore described, the said company (notwithstanding
41 its said agreement again) wrongfully and unlawfully threatened to close up the said opening in Morrison street, and thus shut off the means of access to the said docks, landings and buildings hereinbefore mentioned, and to obstruct the said street and passageway, whereupon the then owners of the said lots and the improvements thereon began a suit in equity in the circuit court of the State of Oregon for Multnomah county, in which Julia D. Church, Jeannette Meier, Abe Meier, Julius Meier, Fannie Frank, William S. Ladd, D. M. French, Charles E. Tilton and G. B. Gilman were plaintiffs and the said Willamette Iron Bridge Company was defendant, restraining and enjoining the said threatened injury, and

the said plaintiffs filed their complaint in the said cause and court, and thereupon, in the consideration of the dismissal of said suit without costs or other proceedings therein, the said Willamette Iron Bridge Company entered into a (further) contract and agreement with the plaintiffs in the said suit whereby the said Willamette Iron Bridge Company agreed to desist from said threatened acts and to leave the said opening and approach in the condition the same now and ever since has been in.

(That the city of Portland, as the successor in interest of the said Willamette Iron Bridge Company, acquired no greater rights in the said approach under the said legislative acts and under its said deed than its said predecessor in interest had or could claim, and it is estopped to close the said opening or to commit the threatened acts herein described.)

And these plaintiffs say that the said acts of 1891 and 1895 of the Legislative Assembly of the State of Oregon, hereinbefore mentioned, and the said conveyance of the said Willamette Iron Bridge Company to the City of Portland, hereinbefore mentioned, whereby
42 the said City of Portland acquired the said Morrison Street bridge with the said approach on Morrison street were subject to said agreement and the rights vested in the said plaintiffs in the said suit and their successors in title.

That defendants now threaten to and are proceeding, without tendering or offering to pay these plaintiffs any compensation therefor, to close up said opening in Morrison street, which is the only means of ingress and egress which plaintiffs and the public enjoy to the said wharves on Morrison street and the said lower wharves in front of plaintiffs' property, erected under said ordinances, and will deprive plaintiffs and the public wholly of the means of access to said lower wharves in front of plaintiffs' property and upon said street, and will destroy the use of said roadway and wharves on Morrison street as a highway as the same have heretofore been used, and plaintiffs believe that defendants will carry into effect their said purpose unless restrained by this honorable court.

Plaintiffs further state that said wharf and wharfing privileges with the right of access to and egress from the same by Morrison street, are property and property rights which they own, and that the same and the rights and privileges granted under and by virtue of said ordinances are vested rights and of great value, and that to close up said opening in Morrison street and so deprive them of the use and enjoyment of said wharf and wharfing privileges and render the same nearly or quite valueless would be to deprive plaintiffs of their property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States, and plaintiffs claim said wharf and wharfing privileges and their
43 use and enjoyment with a right of ingress to and egress from the same as heretofore described, under the provisions of said amendment.

Plaintiffs further allege that the hereinbefore recited ordinances of the City of Portland, accepted and acted upon as aforesaid by plaintiffs' predecessors in the ownership of said property, constitute a contract between said city of Portland, having full power at the time to make the same, and plaintiffs' predecessors; and the acts of the Legislative Assembly of the State of Oregon hereinbefore recited, so far as they confer or undertake to confer upon said defendants any power to deprive plaintiffs of the use of their wharves and wharfing privileges in manner as aforesaid impair the obligation of said contract and violate section 10 of article 1 of the Constitution of the United States, under which plaintiffs hereby claim protection from the proposed action by said defendants as hereinbefore described.

That if said opening is closed great and irreparable damage will result to these plaintiffs and for which plaintiffs have no plain or adequate remedy at law.

Wherefore, plaintiffs pray the order of this honorable court temporarily restraining the defendants and each of them and their respective agents, servants and employés from closing or attempting to close, said opening, or in any way interfering therewith; that on the final hearing said injunction be made perpetual; and that plaintiffs recover from defendant their costs and disbursements herein, and for such other order as is proper.

CAREY & MAYS,
C. E. S. WOOD,
S. B. LINTHICUM, AND
J. C. FLANDERS,
Attorneys for Plaintiffs.

And on the 16th day of July, 1903, the defendants in said cause filed a demurrer to the amended complaint, which, omitting
44 the title of the court and cause, is as follows:

Now come the defendants, and demur to the amended complaint herein, for the reason that the same does not state facts sufficient to constitute a cause of suit against said defendants or either of them.

L. A. McNARY &
J. P. KAVANAUGH,
Attorneys for Defendants.

And on the 22nd day of July, 1903, the following decree and notice of appeal, omitting the title of the court and cause, was made and entered in said cause:

This suit duly came on for hearing upon the demurrer of the defendants to the amended complaint, plaintiffs appearing by Carey & Mays and S. B. Linthicum, their attorneys, and defendants appearing by L. A. McNary, city attorney, and the court being advised in

the premises, it is now, this 22nd day of July, 1903, said plaintiffs at said time appearing by Carey & Mays and S. B. Linthicum, their attorneys, and said defendants by L. A. McNary, city attorney, their attorney, ordered that said demurrer be and the same is hereby sustained.

And thereupon said plaintiffs, by their said attorneys declined to plead further; whereupon the defendants moved the court for a decree herein dismissing said suit; and it appearing to the court that said motion should be allowed, it is therefore considered, ordered and decreed that said suit be and the same is hereby dismissed, and that defendants have and recover of and from the plaintiffs herein their costs and disbursements herein, taxed at $— and that execution issue therefor.

45 Whereupon, on the said 22nd day of July, 1903, the plaintiffs and defendants appearing by their respective attorneys, as aforesaid, plaintiffs in open court gave notice that they appealed from decree and judgment, and each and every part thereof, to the supreme court of the State of Oregon; it is therefore further ordered that said appeal be and the same is hereby allowed, and that the notice thereof so given by plaintiffs be entered in the journal of this court; and it is further ordered, upon the motion of plaintiffs the defendants by their said attorneys appearing and consenting thereto, that said plaintiffs shall have to and including September 15, 1903, in which to file a transcript or such an abstract of the record in this case as may be required, and to otherwise take such steps as may be requisite to vest the supreme court of the State of Oregon with jurisdiction of this cause.

(Signed) ALFRED F. SEARS, JR.,
ARTHUR L. FRAZER,
M. C. GEORGE, *Judges.*

And on the 27th day of July, 1903, appellants filed the following undertaking on appeal (omitting title of court and cause), to-wit:

Whereas, the plaintiffs in the above entitled cause appeal to the supreme court of the State of Oregon, from a certain decree made and entered against the plaintiffs in said cause in the said circuit court in favor of the defendants in said cause, on the 22nd day of July, 1903, dismissing this suit and adjudging that defendants recover of plaintiffs their costs and disbursements;

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees
46 under the last will of Stephen Mead, deceased, Jeannette Meier, Fannie Frank, Julius L. Meier and A. Meier, as principals, and William M. Ladd, as surety, do hereby jointly and severally undertake and promise on the part of the appellants that the

said appellants will pay all damages, costs and disbursements which may be awarded against them on the appeal.

JOSHUA ROBERTS MEAD,
ANNA LEOCADIE LEE,
WILLIAM WESLEY MEAD, AND
STELLA BAHAM MEAD,
Trustees under the Last Will of Stephen Mead, Deceased,
JEANNETTE MEIER,
FANNIE FRANK,
JULIUS L. MEIER, AND
A. MEIER, *Plaintiffs,*
By CAREY & MAYS AND
S. B. LINTHICUM,
Their Attorneys.
WILLIAM M. LADD.

STATE OF OREGON, } ss:
County of Multnomah, }

I, William M. Ladd, whose name is subscribed to the within undertaking as surety, being first duly sworn, say I am a resident and free holder within the State of Oregon, and am not a counsellor at law, sheriff, clerk or other officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities, and exclusive of property exempt from execution.

WILLIAM M. LADD.

Subscribed and sworn to before me this 27th day of July, 1903.

[SEAL.] H. H. PARKER,
Notary Public in and for Oregon.

Due service of the within undertaking by certified copy as prescribed by law, is hereby admitted at Portland, Oregon, July 27, 1903.

47 L. A. McNARY,
Attorney for Defendants.

(Endorsed:) No. A 6740. In the circuit court of the State of Oregon, for the county of Multnomah. Joshua Roberts Mead *et al.* plaintiffs, *vs.* The City of Portland, *et al.* defendants, Undertaking on appeal. Filed July, 27" 1903. F. S. Fields, clerk, by M. S. Phillips, deputy. Williams, Wood & Linthicum, attorneys for plaintiffs.

Assignment of Errors.

And appellants herein say that there is manifest error on the face of the record in this:

(1.) That the said circuit court erred in sustaining the demurrer of defendants to the amended complaint and in not overruling the same.

(2.) That said circuit court erred in dismissing the complaint and in rendering said or any judgment or decree in favor of defendants.

CAREY & MAYS,
C. E. S. WOOD,
S. B. LINTHICUM, AND
J. C. FLANDERS,
Attorneys for Appellants.

APPENDIX.

The amended complaint was the same as the original complaint with the exception that it contained a few additional averments and a few verbal changes, which have been indicated by enclosing the same in brackets.

A demurrer was filed by the defendants to the original complaint, upon the ground, and for the reason, that said complaint did
48 not state facts sufficient to constitute a cause of suit against said defendants, or either of them.

Said demurrer was sustained by the court and the following is a copy of the opinion rendered by the court in sustaining the said demurrer to the original complaint:

Demurrer to the complaint.

In joint session.

Sears, P. J.; George, J.; Frazer, J.

Opinion by Frazer, J.

This suit is brought by the plaintiffs as the owners of property abutting upon Morrison street, between Front street and the Willamette river, against the City of Portland, its engineer and the members of its board of public works, for an injunction to restrain the defendants from closing a passageway in the approach to the Morrison Street bridge, which passageway leads to the lower floors of certain wharves belonging to the plaintiffs.

After alleging the incorporation of the City of Portland and the

official character of the other defendants, the ownership of the property abutting upon the street, its value, the nature of its use, etc., the plaintiffs further allege in substance: That the City of Portland, by an ordinance approved September 28, 1878, authorized the owners of lots 3 and 4 on the north side of Morrison street to construct a wharf on and in front of said lots in the Willamette river, describing the grade upon which the lower floor of said wharf should be, and providing that the owners of said lots should construct and maintain, at their own expense, a pontoon for the landing of
49 small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, etc.; and further providing for the construction of a passageway along and over the north side of Morrison street, and providing that the whole of said passageway and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk, etc.

And that, afterwards, on February 25, 1879, the City of Portland, adopted a similar ordinance authorizing the owners of lots 3 and 4, in block 76, on the south side of Morrison street to erect a similar wharf. In this ordinance is the following provision: "The lower floor of said wharf to conform to the grade of the Coulter and Church's wharf at its connection therewith; provided, that the owner or owners of the above described property shall construct and maintain at their own expense a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan in "auditor's office." This ordinance also contained provisions as to the erection of a passageway along and over the south side of Morrison street, and that the whole of said passageway, and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk. And that under and in pursuance of said ordinances the respective predecessors in interest of plaintiffs in and to the property constructed said wharves; that the wharves consisted of two floors or stories upon the property owned by plaintiffs' predecessors; upon the second story of each of said wharves the respective owners of said property constructed warehouses the lower floor of each
50 of said wharves being extended to the middle of Morrison street, so that Morrison street at the river was covered by the extension of the lower floors of these two wharves on either side, a sidewalk or passageway being erected on each side of the street on a level with the second floors of the wharves.

That the said second stories or upper floors of each of said wharves were built slightly above the level of Front street, and that the lower stories or floors of said wharves were considerably below the level of Front street and were connected with Front street by a roadway running on an incline along Morrison street from Front street down to the portion of said wharves so built on Morrison

street, which said roadway was constructed by the respective owners of said block 76 and the south half of block 77.

That said wharves, docks and warehouses and said approach thereto from Front street have been maintained and used for more than twenty years by plaintiffs and their respective predecessors in interest as landing places for boats and vessels navigating the waters of the Willamette river, and by the people and teams having business at said docks or wharves, and in addition thereto said docks and wharves upon and over said Morrison street and said approach thereto from Front street have been used as a street or highway by the public.

That the grade of that part of Morrison street has never been established otherwise than in and by said ordinances, and that the portions of Morrison street so occupied by said wharves and said roadway have been and are now improved and used as a public street and highway, and contribute to the convenience of landing from boats and vessels and were constructed and have since been maintained with that end in view as well as a means of ac-
51 cess to plaintiffs' said properties.

That by an act, approved October 18, 1878, the Legislative Assembly of the State of Oregon, granted to the Portland Bridge Company, a corporation, a right of franchise to construct a bridge across the Willamette river between Portland and East Portland, "said bridge to be erected at any time within six years after the passage and approval of this act, at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation or its assigns, on or above Morrison street of said city of Portland * * * And, provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland."

That about the year 1886 the said Portland Bridge Company constructed a bridge between Portland and East Portland, the west end of which approach was located at the east end of said Morrison street, and between the west end of said bridge and Front street also constructed a plank road or approach to said bridge over said Morrison street, extending over a part of Morrison street, but said approach did not conform to the grade of Front street, but was constructed at an elevation of two feet above such grade, at the west end of the bridge, and thence inclined to Front street.

That said approach did not, however, cover the whole of Morrison street from Front street to the bridge, but the approach was so constructed that a portion of Morrison street, in the center thereof, and leading from Front street on an incline to said lower docks and wharves was left uncovered, with its original grade unchanged, the same being about eighteen feet wide and extending easterly
52 from Front street about ninety-five feet. That said opening was left in said decking of Morrison street for the purpose of

enabling persons and vehicles to use said roadway running to the lower floors of said wharves.

That, thereafter, the Legislative Assembly of the State of Oregon by an act, approved February 21, 1895, authorized the city of Portland to acquire by purchase, or by appropriation or condemnation, the said Morrison Street bridge, together with all the franchises and property connected therewith, and appointed a bridge committee, consisting of three citizens, to act for the city and in the name of the city in procuring by purchase or condemnation the said Morrison Street bridge and any and all franchises, easements, liens, approaches, structures, etc., connected therewith.

That, afterwards, on July 3rd, 1895, said city, in accordance with the said act of the Legislative Assembly, purchased from the Willamette Iron Bridge Company, a corporation and a successor in interest of said Portland Bridge Company, the said Morrison Street bridge, etc.

That at the time of the said purchase the portions of said Morrison street so occupied by said docks and wharves and said roadway or incline leading from Front street thereto were being maintained and kept up by plaintiffs and their predecessors in interest, and were and have been used by them and the public upon their original grade and without any change in such grade at the time of such purchase and have remained since such purchase in such condition.

That defendants now threaten to and are proceeding, without tendering or offering to pay these plaintiffs any compensation therefor, to close up said opening in Morrison street, which, it is alleged,
is the only means of ingress and egress which plaintiffs and
53 the public enjoy to the said wharves on Morrison street and the lower wharves in front of plaintiffs' property, erected under said ordinance, and will deprive plaintiffs and the public wholly of the means of access to said lower wharves in front of plaintiffs' property and upon said street, and will destroy the use of said roadway and the wharves on Morrison street as a highway as the same have heretofore been used, and plaintiffs believe that defendants will carry into effect their said purpose unless restrained by this court.

It is contended by counsel for the defendant, City of Portland, that this case is substantially similar to the case of Brand *v.* County of Multnomah, reported in the 38 Ore., page 79, and that the decision of the supreme court of this State in that case practically disposes of every question raised by plaintiffs in the case at bar. It is conceded by the plaintiffs that the decision in the Brand case settles two propositions of importance here: (First) That the State has absolute and paramount control of the public highways, including city streets, within its borders, and may, at its pleasure, fix or change the grade thereof. (Second) That an abutting owner is not entitled to compensation for damages to his property as the result of the establishment or alteration of the grade of the adjacent

street. But it is contended that the Brand case is clearly distinguishable from this one in several respects. The Brand case was based upon facts most of which were practically identical with the facts stated in the case at bar. That case was brought for the purpose of restraining Multnomah county from closing the opening in the approach to another bridge across the Willamette river in the city of Portland, the Madison Street bridge, through which an opening was left for a driveway leading to the lower floor of a wharf upon the property of Brand, the plaintiff in that case. There was,
54 however, one important difference between the facts in that case and the one at bar, in this: that the plaintiff Brand had never received permission from the city to extend his wharf over any part of Madison street, and, in fact, there was no wharf upon any part of Madison street, and the plaintiff in that case claimed no right to the use of Madison street for wharfage purposes or for any other purpose than as an ordinary street.

Plaintiffs herein contend that the two cases should be distinguished in several other particulars as follows: First, that the ordinances referred to in the complaint permitting the erection of wharves on Morrison street established the grade of Morrison street, while in the Brand case it is admitted that the grade of Madison street next to the river never had been established prior to the passage of the act authorizing the building of the Madison Street bridge. It does not appear, however, that the common council of the city of Portland, in authorizing or permitting the building of these wharves in Morrison street, was acting within the authority conferred upon it to grade or improve streets, or that it could have granted to plaintiffs or their predecessors the right to erect any such structures under the authority conferred upon them by the city charter to erect, improve or grade the streets of the city. Their authority for such action was admittedly derived from section 38, subdivision 27, of the charter then in force, which authorized the council "to build, construct and erect landings at the foot of the streets terminating at the Willamette river." The city by those ordinances was simply providing for the construction of the landing at the foot of Morrison street. It made no attempt to follow the method provided in the charter for the establishment of the grades of the city streets; and this
55 ordinance, if such had been its purpose, would have been void and of no effect, although the city was probably empowered to provide, as it did, that the part of the wharf in the street might be used for street purposes. But even if the ordinance referred to had been intended to and did establish the grade at Morrison street at that point, we cannot understand how that would affect the question or distinguish this case from the Brand case. If the legislature had the power to establish the grade of a street within the city where no grade had formerly been established, as in the case of Madison street, there is no reason why it should not have the power to alter or change the grade of a street after it had been established.

Second. Plaintiffs attempt to distinguish the case at bar from the

Brand case in that the act of the Legislative Assembly of 1889, authorizing the construction of the bridge at Madison street provided that the bridge should be built in a certain street, while the act of 1878 under the authority of which the Morrison Street bridge was constructed, did not provide that such bridge should be constructed at any particular street, but allowed the Portland Bridge Company to build on any one of many streets within certain limits; and hence, its franchise, being in the nature of a float until the company selected a street on which to build, could not have operated to change the grade of any street. We are unable, however, to agree with counsel that such difference in the acts in question would make the act authorizing the construction of the bridge at Morrison street any less effective in establishing the grade of the street at the approach to the bridge than the act authorizing the construction of the Madison Street bridge. The provisions in regard to the grade of the approaches to the two bridges are practically the same, and
56 although in the case of the Morrison Street bridge the company had the privilege of building on any one of several streets, when it did build it was compelled to make the grade of the approach to the bridge conform to the grade of Front street at the street selected, and we see no reason why, after the street was selected and the bridge built, it should be any less effective in establishing the grade than it would have been if the legislature had directed or authorized the construction of the bridge upon Morrison street only.

Third. The plaintiffs also contend that the act of the legislature authorizing the building of the Morrison Street bridge could not have operated to establish the grade of Morrison street between Front street and the river because the bridge was not built in a direct line with the street, and hence could not be considered a continuation of the street. But certainly the approach to the bridge, the part involved in this controversy, is in a direct line with the street, and it is not clear why the fact that the bridge proper is deflected slightly from a direct line with Morrison street would make it any the less a continuation of that street.

Fourth. The fourth distinction sought to be made by plaintiffs, that the approach as constructed on Morrison street does not, throughout its whole length, exactly conform to the grade of Front street, but where it joins the bridge proper is two feet above said grade, cannot be considered here. Plaintiffs do not ask to have the approach changed to conform to the grade, neither do they complain that the city is threatening to close the opening by a decking a few inches too high for part of its length. The relief demanded is that the city be restrained from closing the opening at all.

Another point insisted upon by plaintiffs may be noticed
57 here, based upon facts, however, exactly similar to those existing in the Brand case. It is that the Portland Bridge Company and its successors having used their franchise to build an approach to their bridge in Morrison street, by building over a part of

the street only, their rights under the franchise were then exhausted, that is, the franchise became fixed and limited to that part of the street appropriated, and cannot now be extended to cover any other part of the street. In support of this contention plaintiffs cite the Railroad Land Grant cases wherein it has been held that where a floating grant of land has been given to a company to aid in the construction of a railroad, the grant becomes fixed when the company files its map of definite location of the road, and the rights of the company under such grant are exhausted; the company can never afterwards acquire title to any other or different lands by a change in the location of the road. They also cite the case of Rush *v.* Jackson, 24 Cal., 317, involving a legislative grant of a right to build a wharf 1200 feet long, in which it was held that the building of a wharf only 200 feet long exhausted the grant.

We think that the case at bar may be distinguished from the cases cited by counsel, for the bridge on Morrison street as built does cover the entire width of the street for the greater part of its length, the part not covered being simply an opening in the center of the street for a passageway to the lower floor of plaintiffs' wharves. But, however that may be, the facts before the supreme court in the Brand case were exactly similar in this respect. The builders of the Madison Street bridge also left an opening in the center of the bridge on Madison street of an almost exactly similar size and shape to the one now under discussion. While it does not appear from the published report of the opinion of the supreme court in the Brand
58 case that this question was considered by them, the statement of facts shows that the same question was before them, and we must presume that it received due consideration. In any event, upon questions based upon a similar state of facts we feel bound to follow the opinion of the supreme court in the Brand case.

We come now to the principal point of difference between this case and the Brand case, and the point upon which plaintiffs base their principal contention. It is that by the ordinances granting to plaintiffs and their predecessors in interest the right to extend the lower floors of their wharves over Morrison street, and to build an incline therefrom connecting with Front street, plaintiffs acquired an easement in the street for the maintenance of such wharves and incline, and that having availed themselves of such easement and expended large sums of money in building such wharves and incline they cannot be now deprived of their rights therein without just compensation. On this point we shall first have to enquire as to what rights plaintiffs or their predecessors in interest did acquire by those ordinances. It is conceded that the street at this point belonged to the public and that the city was made by the legislature its custodian for the benefit of the public. It is settled by the Chicago Lake Front cases, 33 Fed. R. 730; that where wharves are built on city property or public property under the control of the city by private persons, such wharves when built become the property of the city or public subject to such privileges as may be granted

to the builders by way of compensation for the expense of building; and it is conceded by plaintiffs in this case, that although the wharves on Morrison street were built by plaintiffs or their predecessors in interest, they have at all times been the property of the public; that the city is, in fact, the proprietor of the wharves.

59 But the plaintiffs contend that, although they do not own these wharves, they have an interest or an easement in the maintenance of them, and having expended large sums of money in the erection and maintenance of these wharves it would be unjust for the city to deprive them of their use without compensation. It may be conceded to plaintiffs that if by the ordinances in question they, or their predecessors in interest, had acquired any rights or privileges in the use of these wharves different in kind from the rights of the public generally as a compensation for building them or for any other reason, their position would be well taken. It seems to be well settled by the authorities that under such power as was given to the City of Portland by subdivision 27, of section 38, of the then charter of the city, the city might erect wharves on streets terminating on navigable water and receive wharfage for the same. (First Dillon on municipal corporations, section 110: 29 Ency. of Law, page 73, note 1 and cases cited). Also that such power could be delegated by the city to private individuals or private corporations. And it seems equally clear that the city might have granted to the plaintiffs or their predecessors in interest any other special rights or privileges of a public nature in these wharves in Morrison street by way of compensation for their erection, such as a right to erect warehouses thereon, railway tracks thereon, erect water tanks or telephone or telegraph poles or any other beneficial right or privilege. And in all the cases cited by counsel for plaintiffs wherein parties were held to be entitled to compensation for depriving them of the use of wharves erected upon public property, the parties erecting the wharves had been given some special right or privilege not common to the public, such as the right to collect wharfage, erect warehouses or some other right of that char-

60 acter. No case has been cited, and we think none can be found, wherein a party erecting a warehouse or other structure upon public property has been awarded any compensation on account of being deprived of the use of such wharf or structure unless the party erecting the same has been granted some special right or privilege in such structures different in kind from the rights and privileges of the public generally.

We are unable to see wherein the ordinances in question have conferred any right or privilege upon the plaintiffs or their predecessors in interest different from those of the public. They are given no right to collect wharfage for the use of the wharf in Morrison street and no right to maintain any wharves or other buildings thereon, no right to build water tanks, lay railroad tracks, erect telegraph or telephone poles or do any other act or thing thereon other than what might have been done by any other citizen.

It is true that plaintiffs probably have more use for such wharf as a wharf than the public generally have on account of its contiguity to their private wharves, just as they might have more use for the wharf and incline as a street than the public generally, because their private property opens upon the street at this point; but the mere fact that a certain person's property abuts upon any street at a certain point does not give the owner of such property any different or greater right in the street at that point than belongs to the public generally.

It is a well settled rule of law that an individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. Before he can maintain a private action it must appear he suffers a peculiar injury, different in kind, not merely degree or extent, from that which the
61 general public sustains from the same cause; and the same rules applies to a suit by a private individual to restrain the erection of a nuisance. These rules are so well established that we think it unnecessary to cite any of the numerous authorities in support thereof, indeed, they are conceded by plaintiffs to be the law. But the plaintiffs still contend that in this instance plaintiffs will suffer an injury different in kind and not merely in degree or extent from that of the general public. As we understand their contention they do not assert any right to collect wharfage or to use the wharves in Morrison street for any other purpose or in any other way or manner different from that in which any other member of the public might use them. But, they say, we have acquired an easement or a right to the maintenance of the wharves in the street, and that we expended our money in the construction of these wharves on account of or depending upon the maintenance of the wharves in the street. But this only brings us back to where we started. As far as the court is able to determine their easement in the wharves, their right to use the wharves is exactly the same as the right or easement of the public generally. The fact that they use the wharves more or that they travel over them more is a difference in degree or extent, but not a difference in kind. The fact that plaintiffs have expended their money in the erection and maintenance of the wharves makes no difference as far as this rule of law is concerned. It might as well be claimed that because the owner of property had obtained leave from the city authorities to grade and pave a certain portion of a street abutting upon his property and under such leave expended a large amount of money in grading and paving the street, that he thereby acquired an easement in that portion of the street different from that of the public generally but it is conceded that such property owner would not thereby acquire any interest in the street different from that of the
62 public and that he could not restrain the city from changing the grade of the street at that point or from tearing up his pavement and substituting an entirely different pavement on a dif-

ferent grade, although he might thereby lose all the money which he had invested in making the grade and improvement under his permit. But if in the case of the street an individual or corporation had obtained a privilege or franchise for the erection of telephone or telegraph poles or for the laying of a street railway track or for the erection of water tanks to be used in sprinkling the streets, or for any other purpose for which streets are properly used, and on the strength of such franchise had expended money in the building of such structures, such persons or corporation would thereby have acquired a right of which he or it could not be deprived without just compensation, because in that case a right or privilege would have been granted for the use of the streets different from that possessed by the public generally. The right to the use of a wharf is in all respects similar. The whole question turns upon whether or not the plaintiffs have acquired any special right or privilege in the wharf in question.

Again the plaintiffs contend that since the city's interest in these wharves in the street is proprietary, its right to remove the wharves is not any greater than would be the right of a private owner of land who had granted a privilege to another to erect wharves thereon; and, that if a private individual had granted to plaintiffs the right to erect wharves upon his property, and the plaintiffs, relying upon such permission, had built the wharves, they would have acquired an easement in the land upon which the wharves were erected and a right to their continuance and maintenance thereon. The first part of this contention might, for the sake of argument, be granted, that is, that the city's right in these
63 wharves or to remove or close them is no greater than would be the right of a private person under similar circumstances. But counsel for plaintiff are certainly wrong in their contention that an easement in private property can be obtained by a permissive use. If plaintiffs had erected wharves upon private property by permission of the owner, plaintiffs would never acquire an easement in the use of such private property for their wharves while maintaining them under such permission. If "A" obtains permission to dig a drain through the land of "B," for the purpose of draining his own land through the land of "B," although he may maintain and use such drain for a long term of years, he acquires no easement in "B's" land, and "B" or his successor in interest may, at any time, close such drain.

Washburn on Easements pp. 152–197.

It is possible that in this case, if plaintiffs had erected their wharves upon private property, while they would have obtained no easement in the private property or right to continue the maintenance of their wharves thereon, they might in the absence of any agreement to the contrary, have a right to remove the wharves; but if when they obtained permission to erect their wharves upon private land, they had at the same time agreed that the wharves

should become the property of the owner of the land, they would not even have the right of removal.

In this case the law makes the wharves the property of the public as soon as they are placed upon public property, and, as has been stated before, if plaintiffs have not been granted any special rights or privileges in the wharves or a right to their maintenance for any certain time as compensation for their erection, they can have acquired no easement in the public property any more than they could have acquired an easement in the property of a private individual upon whose land they might erect wharves. They
64 admittedly have no right by way of ownership in the wharves themselves.

A careful examination of the ordinances in question does not reveal any special right or privilege granted to the plaintiffs or their predecessors in interest in these wharves and none has been pointed out to us by counsel for plaintiffs. The whole matter was simply permissive. We do not see how any one could find in them anything for plaintiffs more than a mere permission or license to build. It is true that plaintiff's predecessors were required to maintain a pontoon for small boats in the river adjoining the wharves, and maintain a trap for fire purposes in the floor of the wharves, but these provisions were for the benefit of the public entirely and were simply additional considerations which the plaintiffs or their predecessors were to pay (not receive) for the privilege of building the wharves. All other questions arising in this case, such as the right of plaintiffs to the use of these wharves in the street and the incline leading thereto as a street or passageway have been disposed of in the Brand case. Under the authorities and for the reasons given here we see no equity in plaintiffs' complaint.

The demurrer will be sustained.

Sears, J., and George, J., concur.

Carey & Mays, C. E. S. Wood, S. B. Linthicum and J. C. Flanders, attorneys for appellants.

65 (Endorsed:) In the supreme court of the State of Oregon Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead and Stella Baham Mead, trustees under the last will of Stephen Mead, deceased, Jeannette Meier, Fannie Frank, Julius L. Meier and A. Meier, appellants, *vs.* City of Portland, W. C. Elliott, city engineer of the city of Portland, A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell and W. C. Elliott, constituting the board of public works of the city of Portland, respondents. Appellants' abstract. Appeal from the judgment of the circuit court for Multnomah county; Hons. Alfred F. Sears, Jr., A. L. Frazer and M. C. George, judges. Carey & Mays, C. E. S. Wood, S. B. Linthicum and J. C. Flanders, attorneys for appellants, L. A. McNary, city attorney and J. P. Kavanaugh, attorneys for respondents. Filed Sep. 3, 1903, J. J. Murphy, clerk; by Arthur S. Benson, deputy.

STATE OF OREGON, } ss:
Multnomah County, }

The respondents and defendants hereby acknowledge due service of the within abstracts of record and the receipt of the prescribed number of copies thereof at Portland, Oregon, this 31st
66 day of August 1903, and it is agreed between the respondents and appellants that this cause may be heard in the supreme court of Oregon on the within printed abstract that no other abstract or transcript shall be required except that the appellants shall file the requisite certified copies of the decree, notice of appeal and undertaking on appeal.

L. A. McNARY,
Of Attorneys for Respondents.
CAREY & MAYS,
C. E. S. WOOD,
S. B. LINTHICUM, &
J. C. FLANDERS,
Attorneys for Appellants.

67 JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM Wesley Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeannette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

v.

THE CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Appeal from Multnomah county; Hons. Alfred F. Sears, Jr., A. L. Frazer, and M. C. George, judges.

L. A. McNary, city attorney, and J. P. Kavanaugh, for respondents. Charles H. Carey and S. B. Linthicum, for appellants.

Bean, J.

Affirmed.

Filed Apr. 18, 1904.

J. J. MURPHY, *Clerk,*
By —— ——, *Deputy.*

68 This is a suit to enjoin and restrain the defendants from closing a passageway in the approach to Morrison Street bridge, leading to the lower floors of plaintiff's wharves. The complaint, after alleging that the plaintiffs are the owners of block 76 and lots 3 and 4 in block 77, in the city of Portland; that such

property is bounded on the east by the Willamette river, on the west by Front street, and is divided by Morrison street, avers that in 1878, the common council adopted "an ordinance authorizing the construction of a wharf in the Willamette river in front of and opposite lots number 3 and 4 in block No. 77," as follows:

"SECTION 1. The owner or owners of lots 3 and 4, in block 77, in the city of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front street from a point 100 feet north of the north line of Morrison street, the lower floor of said wharf to be as near ten feet above the base of grades as practicable; provided, that the owner or owners of said above described property shall construct and maintain at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison street and to be in accordance with the plan on file in the office of the auditor and clerk.

"SECTION 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway, 15 feet in width along and over the north side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend southwardly into said street for a greater distance than six feet; provided, that the whole of said passageway and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and, provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"SECTION 3. The owners of the property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in ordinance No. 1140, entitled, 'An ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments thereto to the contrary notwithstanding."

Afterward, on February 21, 1879, the city council adopted a similar ordinance, authorizing the owners of the property on the opposite side of Morrison street to erect a wharf in front of their property, "running from the center line of Morrison street extended in a direct course to a point 130 feet south of the center line of Morrison street, extended at a distance of 137½ feet from the east line of Front street. The lower floor of said wharf to conform to the grade of Coulter and Church's wharf at its connection therewith."

69 This ordinance also required that the grantees should construct and maintain, at their own expense, at the foot of Mor-

rison street, and in accordance with the plans in the auditor's office, a pontoon suitable for the landing of small boats, and contained a provision as to the erection of a passageway from and along the south side of Morrison street, and provided:

"That the whole of said passageway, and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk."

The complaint further avers that under and in pursuance of the provisions of such ordinances, the respective predecessors in interest of the plaintiffs constructed wharves consisting of two floors or stories in front of the property owned by them; that the lower floor of each wharf extended to the middle of Morrison street and a sidewalk or passageway was erected on each side of the street on a level with the second floor; that the second story forming the upper floors of each of the wharves was built slightly above the level of Front street, while the lower floors were considerably below such level and were connected with Front street by a roadway or incline along Morrison street, constructed by the owners of the property; that such wharves, docks, and warehouses, and the approaches thereto from Front street, have been maintained and used by the plaintiffs and their predecessors in interest for more than twenty years as a landing place for boats and vessels navigating the waters of the Willamette river, and for people and teams having business at the docks or wharves; that "said docks and wharves, upon and over said Morrison street and said approach thereto from Front street so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public," and * * * "the same are a public street and highway;" that the wharf over and on Morrison street and the roadway leading thereto from Front street facilitate travel on that portion of Morrison street between Front and the river, and contribute to the convenience of boats and vessels in landing, and were constructed and have since been maintained with that end in view as well as for the purpose of affording access to plaintiffs' property; that during the greater portion of every year boats and vessels have made their landing
70 and discharged and received their freight and passengers on the lower floor of such wharf; that in 1878, the legislature passed an act authorizing the Portland Bridge Company, or its assigns, to construct and maintain a bridge across the Willamette river between Portland and East Portland, at such point or location on the bank of the river, on or along any of the streets as might be selected by it, on or above Morrison street, it being provided: "That the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland;" that, about the year 1886, in pursuance of the provisions of the act referred to, the Portland Bridge Company, or its successors in interest, constructed a bridge between Portland and East Portland, the west end of which was located at the east end of Morrison street, and also constructed a plank roadway or approach to the bridge from Front

street; that when the bridge company began the construction of the bridge, it commenced to build two piers in the Willamette river to support the western end of the structure, within a few feet of and in front of the outer line of the wharves previously constructed by the plaintiffs' predecessors in interest, and in such position as to interfere greatly with the use of such wharves; that thereupon the owners of the wharves protested against the acts of the bridge company and threatened to bring suit or action to prevent the erection of such piers, on the ground that they were and would continue to be public nuisances and illegal; that, as a settlement of such controversy and in consideration of the waiver by the property owners of their right to institute and prosecute suits and proceedings for such purpose, the bridge company agreed forever to leave an opening in the center of the approach to the bridge for ingress and egress to and from the wharves of the plaintiffs; that, in pursuance of such agreement and compromise, the property owners refrained from prosecuting suits or proceedings to enjoin the construction of the piers, and the bridge company did not cover the whole of Morrison street from Front street to the west end of the bridge with the approach, but left an opening therein, 18 feet wide and extending
71 easterly from Front street about 95 feet, which opening has ever since existed and is now maintained; that, in 1890, the bridge company, notwithstanding its agreement, threatened to close such opening, whereupon the property owners began a suit in the circuit court for Multnomah county to enjoin and restrain it from doing so, and, in consideration of the dismissal of such suit without cost or other proceedings therein, the bridge company contracted and agreed to leave the opening in its then condition, and it has ever since so remained; that in 1895, the legislature passed an act authorizing the city of Portland to acquire by purchase or condemnation the bridge referred to, and on July 3d of that year the bridge company conveyed it to the city by warranty deed with all its appurtenances; that at the time of the purchase by the city, the docks and wharves at the foot of Morrison street, constructed by the property owners under the previous ordinances of the city, were being and ever since have been maintained and used by the plaintiffs and their predecessors in interest; that the defendants now threaten, and are proceeding, without tendering or offering to plaintiffs any compensation therefor, to close the opening in the approach to Morrison Street bridge, which will deprive them and the public of all means of access from the street to the wharves on Morrison street, and the plaintiffs of property rights without just compensation. A demurrer to the amended complaint was sustained by the court below, the complaint dismissed and plaintiffs appeal.

BEAN, *J.*:

The only substantial difference between this case and that of Brand *v.* Multnomah County, 38 Or. 79, is that the plaintiffs here assert that the ordinances authorizing the construction by their pred

ecessors in interest of wharves in front of their property and extending over and across the foot of Morrison street, and the subsequent construction of such wharves, conferred upon them vested rights of which they cannot be deprived without compensation, and that the agreement between them and the bridge company that the opening in the approach to the bridge on Morrison street be
72 forever left open is valid and binding on the defendants as the successors in interest of the bridge company. The Brand case decided that a change or alteration of the grade of a street in a municipality may be made by lawful authority, without liability to the abutting property owners for consequential damages, and that an act of the legislature authorizing the construction of a public bridge across the Willamette river at Portland, connecting the streets on either side of the river, and providing that the approach to the bridge on the west side shall conform to the grade of First street, is a legislative alteration or change of the grade of the cross street from First street to the river, for which abutting property owners have no remedy, even though the construction of such approach may entirely cut off access from the street to a wharf in front of their property. So far, therefore, as any of these questions are involved in the present controversy, they are not now open to discussion.

The fact that the act of the legislature authorizing the building of the Madison Street bridge provided that it should be located on a certain street, while that under which the Morrison Street bridge was built gave the grantee an option to locate it on any street which it might select, on or above Morrison, does not render the latter act any the less effective in establishing the grade of the street selected, and upon which the bridge was actually built. The provisions of the two acts in regard to the approach to the bridge and the manner of its construction are substantially the same, the only difference being that in the former the grantee was confined to a particular street, while in the latter it had the right of selection. When, however, it did locate its bridge, it was as much bound to make the approach conform to the grade of First street as if the particular street selected had been named in the act.

The principal contention is, that, by the ordinances granting the plaintiffs and their predecessors in interest the right to construct wharves in front of their property and to extend the lower floors thereof across the foot of Morrison street, and to build an incline therefrom, connecting with Front street, plaintiffs acquired an ease-
73 ment, or property right, in the street for the maintenance of such wharves and incline, and, having expended their money in the construction thereof, they cannot now be deprived of their rights without just compensation. For the purposes of this case it may be accepted as settled law that, where a municipal corporation, in pursuance of proper legislative authority, grants a valid franchise, privilege or right to use or occupy a public street, common or levee, or navigable waters adjacent thereto, for a public purpose, such as the construction and maintenance of wharves in aid of commerce,

water tanks for use in sprinkling streets, telegraph and telephone poles, railway tracks, and the like, and the grantee, in reliance on such grant, expends money in the prosecution of his enterprise, he thereby acquires a property interest or right, which can only be taken away under the power of eminent domain and after proper compensation: 1 Dillon on Mun. Corp., (4th ed.) §§ 110 and 111; 29 Am. & Eng. Enc. Law, (1st ed.) 69; Portland and Willamette Valley R. Co. *v.* Portland, 14 Or. 188; Savage *v.* Salem, 23 Or. 381; City of Des Moines *v.* C. R. I. & P. R. Co., 41 Iowa, 569; Phillipsburg Electric Co. *v.* Phillipsburg, 66 N. J. L. 505; Langdon *v.* Mayor, etc., of New York, 93 N. Y. 129; Williams *v.* Mayor, etc., of New York, 105 N. Y. 419; Kingsland *v.* Mayor, etc., of New York, 110 N. Y. 569. In such case the grantee acquires a right or easement in the street different in kind from that enjoyed by the general public, and the building or structure put therein by him is under his control, subject to the paramount authority of the municipality. But, as we understand the ordinances in question, neither the plaintiffs nor their predecessors in interest were granted rights or privileges within this rule to construct and maintain a wharf at the foot of Morrison street. The clear purpose of the ordinances was to authorize and regulate the construction of wharves in front of private property. It is so expressly stated in the title, and the granting part of the ordinances provides that the owner or owners of certain described property are authorized and permitted to construct a wharf in the river, "on and in front of" such property. There is nowhere,
74 in either of the ordinances, a grant of any right or privilege to build a wharf at the terminus of Morrison street. In the ordinance adopted in 1878, there is scarcely an inference that the lower floor of the wharf was to extend into Morrison street, and, as regards the upper floor, the provision is that it should not extend beyond the line of the block, except for a passageway of a certain described width and over the north side of the street. The grantee was required to construct and maintain pontoons in the river at the foot of the street for the landing of small boats, with steps leading therefrom to the lower floor of the wharf. It was expressly provided that the whole of the passageways along the street and those portions of the wharf extending over and into the street "shall be subject to regulation by the common council as a part of said street and sidewalks," thus manifesting an intention to preserve the public character of the street, and not to vest in the grantee any rights or privileges therein not enjoyed by the general public. The ordinance of 1879, in describing the dimensions of the wharf authorized to be erected, says that it shall extend a certain distance south from "the center line of Morrison street" and indicates that the wharf constructed by the property owners on the opposite side of the street extended to that point. The grant, however, is confined to the construction of a wharf "on and in front of" private property, there being a provision like the one in the former ordinance requiring the grantees to construct pontoons in the river for the landing of

small boats, while the right is reserved to the council to regulate the passageways along the street and any part of the wharves extending therein "as a part of the street and sidewalk." The reasonable interpretation of these ordinances is that they were intended to regulate the construction of wharves by the property owners on either side of the street in front of their property, with permission, perhaps, to extend the lower floors of such wharves over and across the foot of Morrison street, for the purpose of affording access from the street to the wharves. There is, however, no grant of any privilege or right to use or
75 appropriate the street or an extension thereof for wharfage purposes. On the contrary, the street and any improvements which may be put there by the abutting property owners were reserved to the use of the entire public, and the grantess had no greater rights under the ordinances than those enjoyed by the general public. That this is the proper construction of the ordinances and of the rights of the grantees thereunder is supported by the averment of the complaint, to the effect that the wharves and docks constructed by the plaintiffs and their predecessors in interest "upon and over said Morrison street and said approach thereto from Front street so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public," and * * * "are a public street and highway." If the grantees acquire no other or greater rights or interests in the street than the general public, the fact that they have expended money in extending the street into the river, or building approaches therein to their wharves, or in otherwise improving it, does not give them a right to compensation for the loss or inconvenience caused by a change in the grade any more than a change in the grade would entitle an abutting property owner to compensation because he had previously improved a street in front of his property by authority of the city. The grantees acquired no private rights under the ordinances, and the construction by them of the wharf and landing at the foot of the street was merely an extension of the street, which did not vest in them any rights other than those they may have had as a part of the general public: Hoboken Land and Improvement Co. *v.* Mayor of Hoboken, 36 N. J. L. 540. The fact that by reason of the proximity of their property to the street they were enabled to make more use of it and its extension than others did is a mere difference in degree and not in kind. If the grant had been to construct a wharf at the foot of the street, to be under the control of the grantee, with the express or implied power of collecting tolls for the use thereof, an entirely different question would have been presented for consideration, and the argument of plaintiffs would then
76 have been cogent and forceful. The ordinances, however, did not give to the plaintiffs or to their predecessors in interest authority to build a wharf at the foot of the street for commercial purposes, but rather confer the right to improve the street by ex-

tending it into the river so that they could the more readily reach their own property therefrom, and the fact that their improvements have been rendered valueless on account of the subsequent change in the grade of the street does not entitle them to compensation. Neither are they entitled to any rights under the rule applicable to an executed parol license. Their occupation of the street and construction of the wharf and landing at the foot thereof were permissive, under ordinances of the city, defining their rights. They could not acquire any interest or easement in the street not conferred by the ordinances, because their use could not, in law, be adverse: Thayer *v.* New Bedford Railroad, 125 Mass. 253; Washburn on Easements, §§ 152, 197.

We agree, therefore, with the court below that the plaintiffs have no vested rights or interests in the street under the ordinances referred to. Nor do we think they can claim relief as against the defendants on account of the alleged contract between them and the bridge company, that the opening in the approach to the bridge should forever remain open. The alleged consideration for such contract was the waiver by the plaintiffs of a right to commence proceedings to enjoin the bridge company from constructing piers to support the bridge in the river opposite the foot of Morrison street. In view of the rights of the plaintiffs under the ordinances referred to, as we have interpreted them, it is doubtful whether this was a sufficient consideration for such contract: Blackwell *v.* Old Colony R. Co., 122 Mass. 1; Thayer *v.* New Bedford Railroad, 125 Mass. 253; President and Fellows of Harvard College *v.* Stearns, 15 Gray, 1.

The bridge company, moreover, was acting under a grant from the legislature authorizing it to construct the bridge for the use and convenience of the public as a highway, and it is far from certain
77 that it had authority to contract away any of the rights or duties imposed upon it by the act. But, however that may be, the alleged contract was not of record, and there is no averment in the complaint that defendants had notice or knowledge thereof at the time of their purchase.

There were some other questions discussed at the argument, including the effect of the act of the bridge company in leaving an opening in the approach to the bridge at the time of its construction, but they were involved in and determined by the Brand case, and need not be further considered here.

It follows that the decree of the court below must be affirmed and it is so ordered.

78 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 7th day of March 1904, Present: Hon. Frank A. Moore, chief justice, Hon. Charles E. Wolverton, associate justice, Hon. Robert S. Bean, associate justice, and J. J. Murphy, clerk, the following proceedings were

had on Monday the 18th day of April, 1904, the same being the 21st judicial day of said term:

JOSHUA ROBERTS MEAD, ANNA LEOCADIE Lee, William Wesley Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants, *vs.* THE CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, Wm. Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.	Appeal from Multnomah County.

This cause having heretofore to-wit: on the 22nd day of March 1904, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the record herein and the arguments of the respective attorneys thereon and being now fully advised in the premises finds that there is not error as alleged.

It is therefore considered, ordered and decreed that the decree in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing to the court and the court further finds that the respondents' demurrer to the appellants' complaint on the
79 ground that it does not state facts sufficient to constitute a cause of suit against the said respondents, is well taken and should be sustained.

It is now further ordered and decreed that the said demurrer be and the same is hereby sustained.

And it further appearing that the appellants declined to further plead. it is further ordered and decreed that the said suit be and the same is hereby dismissed. And it further appearing that the appellants filed an undertaking for the appeal with William M. Ladd as surety therein. it is further ordered and decreed that the respondents recover of appellants and William M. Ladd, their said surety, the costs and disbursements of said respondents in this court upon the appeal allowed and taxed at $—.

It is further ordered that the cause be remanded to the said court below and that a decree be there entered and docketed in accordance herewith.

80 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

vs.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

Come now the appellants by their attorneys, and waive their right to petition the court for a rehearing in this cause.

CAREY & MAYS,
C. E. S. WOOD,
S. B. LINTHICUM, AND
J. C. FLANDERS.

(Endorsed:) In the supreme court of the State of Oregon. Joshua Roberts Mead, *et al.*, appellants *vs.* City of Portland *et al.* Filed May 2, 1904, J. J. Murphy, clerk.

81 In the Supreme Court of the State of Oregon.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY Mead, and Stella Baham Mead, Trustees under the Last Will of Stephen Mead, Deceased; Jeanette Meier, Fannie Frank, Julius L. Meier, and A. Meier, Appellants,

vs.

CITY OF PORTLAND, W. C. ELLIOTT, City Engineer of the City of Portland; A. L. Mills, Richard Williams, William Macmaster, A. H. Breyman, C. A. Cogswell, and W. C. Elliott, Constituting the Board of Public Works of the City of Portland, Respondents.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said suit filed with our said court as the abstract (in lieu of transcript) on appeal from the decree of the circuit court of the State of Oregon for the county of Multnomah from which the said appeal was taken, and is the record upon which said appeal was heard, and the decree of our supreme court entered thereon on the 18th day of April 1904.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the decree of our said supreme court

upon the said appeal entered on the said 18th day of April 1904, and a full, true and correct copy of the opinion of the court filed on said 18th day of April 1904, and upon which said decree was entered.

I further certify that the petition for a writ of error in said
.82 cause and the endorsement thereon; the order allowing the writ of error; the citation and proof of service endorsed thereon, the writ of error, and allowance thereof, all which are attached to the above and foregoing, are the original petition, order, citation and writ of error lodged with and now in my office; and I do certify that the above and foregoing are such original papers so lodged and filed with me; and that the foregoing copy of bond, its approval and endorsements thereon, and the assignment of errors, is a true and correct copy of such originals lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

I further certify that the cost of the foregoing return to the writ of error is $30.00 and that said amount was paid by Messrs. Carey & Mays.

In witness whereof I have hereunto set my hand and seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this 31st day of May 1904.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 19,407. Oregon supreme court. Term No. 307. Joshua Roberts Mead, Anna Leocadie Lee, William Wesley Mead, and Stella Baham Mead, trustees, &c., *et al.*, plaintiffs in error, *vs.* The City of Portland *et al.* Filed June 29, 1904. File No. 19,407.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 20 1905
JAMES H. McKENNEY,
Clerk.

Motion to Advance Case

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 807 56.

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, AND STELLA BAHAM MEAD, TRUSTEES, ETC., ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF PORTLAND ET AL.

In Error to the Supreme Court of the State of Oregon

(19407)

(19407)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 307

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, AND STELLA BAHAM MEAD, TRUSTEES, ETC., ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF PORTLAND ET AL.

In Error to the Supreme Court of the State of Oregon

Come plaintiffs in error and defendants in error in the above entitled cause by their attorneys, and move the Court to advance said cause for hearing to some day of week commencing February 27th, 1905, and in support thereof represent to the Court as follows:

I. STATEMENT OF MATTER INVOLVED.

Plaintiffs in error are the owners of block 76 and the south half of block 77, in the City of Portland, Oregon, both of which parcels of land are bounded on the west by Front street, and on the east by the Willamette river, the north line of Morrison street being the south boundary line of the south half of block 77 and the south line of Morrison street being the north boundary line of block 76.

By ordinances of the City of Portland, approved September 26, 1878, and February 21, 1879, respectively, the City of Portland authorized the owners of said property to construct wharves in front thereof with permission to extend the lower

floor of the same to the center line of Morrison street, the portions of such wharves extending into and over the street to be subject to regulation by the Council as a part of the street. The wharves were constructed substantially as authorized, and were thereafter used as landings for boats and vessels plying the waters of the Willamette river.

The foot of Morrison street at said point is several feet below the grade of Front street running at right angles thereto, and an inclined roadway was constructed from Front street down to the wharves, which roadway also afforded access to the private property of the plaintiffs in error lying north and south of the public wharves.

Thereafter, under a legislative act of the State of Oregon, the Portland Bridge Company, a private corporation, and its assigns constructed a bridge across the Willamette river, the west end of which was located at the foot of Morrison street, and a plank roadway or approach thereto was constructed over Morrison street from Front street to the Willamette river, which roadway or approach covered the whole of Morrison street from Front street to the river, except an opening in the center thereof, about 18 feet in width and 95 feet in length, extending from Front street toward the river, as a means of access to the public wharf and lower floors of the private wharves on either side thereof.

Thereafter, and in the year 1895, the City of Portland purchased the said bridge across the Willamette river and is still the owner of the same with its appurtenances.

In the year 1902, the City of Portland, through its Board of Public Works and without compensating or offering the plaintiffs in error compensation therefor, undertook to close the opening to said bridge approach leading to the public and private wharves below.

The plaintiffs in error claim the acts of the City of Portland in that regard deprives them of the use of said wharves and wharfing privileges, in violation of Section 10, Article I of the Constitution of the United States, under which plaintiffs claim protection, and have sought to enjoin the action of the municipal authorities.

II. REASONS FOR THE APPLICATION.

(a) The case is one of public importance, involving the right of the City of Portland to construct an approach to a bridge constituting a public thoroughfare across the Willamette river in said city, and over which many hundreds of street cars and vehicles and many thousands of pedestrians pass

daily. A new bridge is now in course of construction and it is most important that the question involved shall be determined at the earliest possible time, in the interests both of the municipality and its citizens, and the private rights of the property-owners affected.

(b) Counsel for the respective parties have to cross the continent to present the case, and Mr. Chas. H. Carey, who will represent the plaintiffs in error, has been notified that the case of U. S. vs. Wimans, No. 180 on the docket, in which he is counsel, will be set for hearing the latter part of the week beginning February 27th, 1905. He is desirous that this case be heard at the same time if possible, that two trips to Washington may be avoided.

CAREY & MAYS,
C. E. S. WOOD,
S. B. LINTHICUM,
J. C. FLANDERS,
Attorneys for Plaintiffs in Error.

L. A. McNARY,
J. P. KAVANAUGH,
GEORGE H. WILLIAMS,
Attorneys for Defendants in Error.

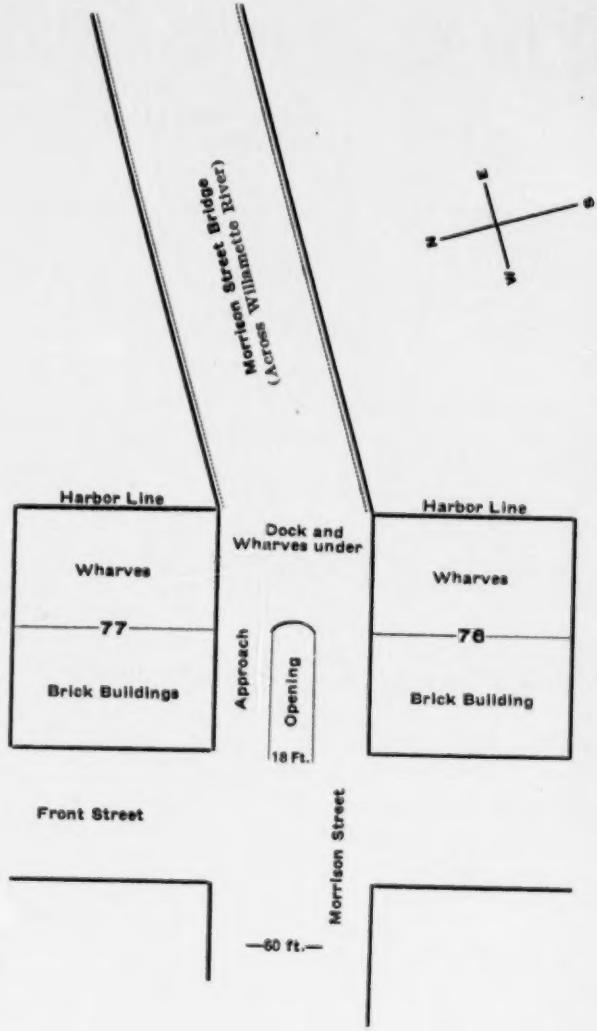
THE CITY OF PORTLAND, et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

Brief for Plaintiffs in Error

CHAS. H. CAREY, C. E. S. WOOD,
S. B. LINTHICUM and J. C. FLANDERS,
ATTORNEYS FOR PLAINTIFFS IN ERROR.

F. W. Baker and Company, Printers, Portland, Oregon.


Morrison Street Bridge
(Across Willamette River)
N
E
S
W
Harbor Line
Wharves
77
Brick Buildings
Dock and
Wharves under
Approach
Opening
18 Ft.
Harbor Line
Wharves
76
Brick Building
Front Street
Morrison Street
60 ft.

IN

The Supreme Court of the United States

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD and STELLA BARHAM MEAD,
Trustees, Etc., *et al.*,

v.

THE CITY OF PORTLAND *et al.*,

In Error to the Supreme Court of the State of Oregon.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE.

The City of Portland has threatened to close the means of access to plaintiffs' wharves on the Willamette river, lying at the foot of Morrison street in that city. The wharves were built in 1878 and 1879, pursuant to the terms of certain ordinances authorizing plaintiffs' grantors to erect wharves extending into the Willamette river in front of their property and to extend the lower floors thereof, upon a prescribed grade, over the adjacent half of Morrison street. The wharves were promptly built and have since been maintained and utilized, together with a roadway

built by the beneficiaries under these ordinances; such roadway extending along Morrison street on an incline from Front street down to the lower floors of the wharves on Morrison street, and constituting the sole means of access to these lower wharves, except from the river.

The City of Portland proposed to close this roadway. Thereupon plaintiffs brought this suit against the city and certain of its officers to restrain this contemplated action, claiming that, in effect, this would destroy their vested property rights in the wharves at the foot of the street.

The case was begun in the State Circuit Court at Portland, Oregon, and a demurrer to the amended complaint was sustained and the suit was dismissed. The plaintiffs appealed to the State Supreme Court, but the decision was affirmed. Upon writ of error to the Supreme Court of Oregon, the cause is here to be heard upon the sufficiency of the amended complaint to state a cause of suit.

SYNOPSIS OF COMPLAINT, ETC.

Some of the plaintiffs are, and have been for many years, the owners and in possession of block 76, in the City of Portland, and the improvements thereon, and the wharf, riparian and water rights and privileges attached thereto; the other plaintiffs are and have been for a long time the owners in possession of the south half of block 77, in said city, with its improvements and like rights and privileges. Said blocks 76 and 77 are bounded on the east by the Willamette river and on the west by Front street. Morrison street is the north boundary of block 76 and the south boundary of block 77.

RESERVATION OF WHARF RIGHTS IN ORIGINAL TOWN PLAT.

In the dedication by Daniel H. Lownsdale of the plat of the Town of Portland, recorded in the records of Multnomah county on December 16, 1852, and which said plat includes all that portion of Morrison street from Front street east to the Willamette river, it is, among other things, provided as follows:

"The wharves and wharfing privileges are especially reserved to the owners of the claim, and never (except by deed) subject to any but the laws of the Territory of Oregon or ordinances of the town or city corporation, as other town (private) property."

ORDINANCES.

Ordinance No. 2273 of the City of Portland, approved September 28, 1878, authorized the owners (then Coulter and Church) of lots 3 and 4 (the south half) of said block 77 to erect a two-story wharf. This ordinance is as follows:

"The City of Portland does ordain as follows:

"Section 1. The owner or owners of lots 3 and 4, in block 77, in the City of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front street, from a point 100 feet north of the north line of Morrison street, the lower floor of said wharf to be as near ten feet above the base of grades as practicable; *provided, that the owner or owners of said above described property shall construct and maintain at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison*

street and to be in accordance with plan on file in the office of the auditor and clerk.

"Section 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway, 15 feet in width along and over the north side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend southwardly into said street for a greater distance than six feet; *provided, that the whole of said passageway and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and, provided, further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.*

"Section 3. The owners of the property described in Section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in Ordinance No. 1140, entitled, 'An Ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments thereto to the contrary notwithstanding."

By Ordinance No. 2387, approved February 21, 1879, a like privilege was conferred upon said owners of the north half of said block 76. Section 1 of said ordinance is as follows (the other section thereof being substantially identical with the corresponding sections of Ordinance No. 2273):

"Section 1. The owners of lots 3 and 4, in block 76, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette river

on and in front of the above described lots. The easterly line of said wharf to commence at a point 147 feet east of the east line of Front street and running from the center line of Morrison street extended in a direct course to a point 130 feet south of the center line of Morrison street extended, at a distance of 137½ feet from the east line of Front street.

"The lower floor of said wharf to conform to the grade of Coulter and Church's wharf at its connection therewith; *provided, that the owner or owners of the above described property shall construct and maintain at their own expense a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan in auditor's office.*"

WHARVES AT THE FOOT OF MORRISON STREET.

Each owner, it will be observed, was authorized to occupy the adjacent half of Morrison street with the lower floor of his wharf, the center line of the street being the dividing line between the two wharves; *and such lower floors, including the portions thereof extending into Morrison street, were to be built upon a prescribed common grade.* They were expressly required to maintain a pontoon for the landing of small boats, with steps, and a trap for fire purposes.

The wharves were promptly built. Each consisted of two floors or stories, with a large warehouse over the second floor. The second floors were built slightly above the level of Front street with approaches thereto as provided in the ordinances. The lower floors, including the extensions thereof into Morrison street, were *built upon the prescribed grade*, and, as a

result, were considerably below the level of Front street. At the same time, a roadway was constructed, extending along Morrison street on an incline from Front street down to the lower wharves.

The entire cost of these extensive improvements was borne by plaintiffs' grantors, the beneficiaries under the ordinances; and they and their successors in interest, at large expense, have ever since (*a period of more than twenty years*) maintained such improvements in good order and condition, and have at all times complied with the provisions of said ordinances, including the maintaining of the pontoon, steps and fire traps. The privileges conferred by the ordinances, and particularly the right to extend the lower floors of said wharves into Morrison street, were of great value; and the expense of making and maintaining these improvements was incurred in the belief that under the ordinances vested property rights were acquired.

Since their construction, *a period of more than twenty years*, these wharves have been continuously utilized by plaintiffs, their grantors and tenants, for various purposes; and to the uses which have been made thereof the portions of the lower wharves extending into Morrison street have been most essential. They have been extensively used as landing places for vessels navigating the Willamette river, and during the greater part of the year vessels can only make their landings and discharge and receive their freight and passengers at the lower wharves, to which the only means of access, except from the river, is the roadway from Front street.

In addition to the uses made thereof by plaintiffs and their grantors, said roadway and lower wharves on Morrison street have likewise been used by the public as a street or highway, the grade of which has

never been established otherwise than by said ordinances.

MORRISON STREET BRIDGE.

In 1878 the legislature of Oregon passed an act, approved October 18, 1878, authorizing the Portland Bridge Company or its assigns to construct and maintain a bridge across the Willamette river between Portland and East Portland "at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland, as may be selected or determined on by said corporation, or its assigns, on or above Morrison street of the City of Portland, and any street of said City of East Portland."

Claiming to be authorized by the provisions of this act, *but long after the construction of said wharves and roadway and their maintenance and use for many years*, said bridge company, or its successor in interest, in or about the year 1886, constructed a bridge between Portland and East Portland, the west end of which was located at the east end of Morrison street. Between the west end of said bridge and Front street a plank road or approach was likewise constructed over Morrison street. This approach was about two feet above the grade of Front street at the west end of said bridge, and thence inclined downward to Front street. *It did not, however, occupy the whole of Morrison street, but was so constructed as not to cover or interfere with the roadway extending from Front street to the lower wharves.* That is, for the purpose of permitting the use of this roadway and leaving free access to the lower wharves to which it led, an opening was left in the approach to the bridge, about 18 feet wide, and extending easterly along the center of Morrison street about 95 feet.

This opening has never been closed, and no attempt has been made to interfere with the roadway to the lower wharves until the acts complained of which induced this suit.

In 1895, the City of Portland, under legislative authority, purchased the Morrison street bridge from the Willamette Iron Bridge Company, the successor in interest of the Portland Bridge Company, and thereafter, under the provisions of the act of the legislature approved February 21, 1895, the County Court of Multnomah county assumed and has since had the care, charge, maintenance, and operation of said bridge and the approaches thereto.

The defendants now propose closing this opening in Morrison street without paying any compensation to the plaintiffs therefor, the result of which would be to shut off all means of access to the lower wharves, and practically to render such lower wharves of no value whatever; and according to the contention of the plaintiffs, such action on the part of the defendants would result in depriving the plaintiffs of vested property rights without compensation, contrary to the provisions of the Constitution of the United States.

ADDITIONAL GROUND FOR RELIEF.

The complaint sets forth an additional ground of relief, as follows:

In the year 1886, the Willamette Iron Bridge Company began the construction of the bridge, and built two piers in the Willamette river to support the western end of such bridge. These piers were built in the river in front of the outer line of the wharves, and so near to them as to obstruct the navigation of the river at that point and interfere with access to and use of these wharves by vessels navigating the

river; and at the same time said bridge company began to construct the approach to said bridge over Morrison street, and threatened so to construct the same as to greatly interfere with the access to the wharves.

On or about April 6, 1887, the owners of the wharves, plaintiffs' predecessors in interest, protested against such acts of the bridge company, and claimed that said structures were and would continue to be nuisances, and that as owners of the wharves they had a right to have the same abated and to recover damages against said bridge company for the special injuries sustained by them.

This controversy was settled by an agreement between the bridge company and the owners of the wharves, whereby the bridge company agreed forever to leave the opening in said bridge approach substantially as it now is, and the owners of the wharves, on their part, agreed to permit the piers to remain as then constructed, and as they have since remained, and to waive all objections to the construction of said approach; the effect of which agreement was to leave said opening forever open and unobstructed for free ingress and egress to and from said wharves. Both parties acted upon this agreement, and the wharf-owners forebore to prosecute any suit or legal proceedings.

Subsequently, and some time about the year 1890, and while said bridge company was the owner and in possession of said bridge and approach thereto on Morrison street, the bridge company unlawfully threatened to close said opening in Morrison street and shut off means of access to the wharves; whereupon the then owners of the property and improvements began a suit in the Circuit Court of the State of Oregon, for Multnomah county, against the bridge

company, to restrain such threatened injury. In consideration of the dismissal of this suit, without costs or further proceedings therein, said bridge company entered into a further contract with the plaintiffs in said suit, whereby it agreed to desist from said threatened acts, and to leave said bridge and opening in the condition the same now is.

The complaint then alleges that the City of Portland, as the successor in interest of said bridge company, acquired no greater rights under the acts of the legislature and its deed from said bridge company, than said bridge company had or could claim, and is estopped to close said opening or to commit the threatened acts; and that said acts of the legislature of 1891 and 1895, and the deed from said bridge company to the City of Portland, whereby said city acquired said bridge with said approach on Morrison street, was subject to said agreement, and the rights vested in the said plaintiffs in said suit and their successors in title.

POINTS AND AUTHORITIES.

I.

THE WHARF OWNERS HAVE VESTED RIGHTS, WHICH CANNOT BE TAKEN WITHOUT COMPENSATION.

The original townsite proprietors in laying out the part of the city in which Morrison street is situated, reserved "the wharves and wharfing privileges." The owners of riparian lots succeeded to this, and by state statute and city ordinance their right to wharf out was recognized.

By the settled rule in Oregon, abutting lot owners, by virtue of their ownership of lots facing on a street, own the fee to the middle of the street, subject to the public use of the street as a highway.

Banks v. Ogden, 2 Wall. (U. S.) 57.
Huddleston v. Eugene, 34 Ore. 243-352.
McQuaid v. Portland Ry. Co., 18 Ore. 237.

The lot owners, therefore, had the right, not only to wharf out in front of their lots, but in front of Morrison street also.

It is a situation quite different from that shown in cases where there was no reservation of the wharfage right, and where it is therefore held that a wharf built by a city at the terminus of a street is part of the street, free to the public, and not subject to a private use for which wharfage may be taken.

Russell v. The Empire State, Newb. 541, Fed. Cas. No. 12, 145; 21 Fed. Cas. 23.
The Geneva, 16 Fed. Rep. 874.
Barney v. Baltimore, 1 Hughes 118, Fed. Cas. No. 1029, 2 Fed. Cas. 886.

It is usually held that the legitimate and proper use of a street terminating at the river is as a landing place, and that the municipal corporation has the right to build wharves at the termini of its streets,

but this does not apply where the right of wharfage is reserved.

1 Dillon, Municipal Corporations, Sec. 109.

The wharves at the foot of the street, as well as in front of blocks 76 and 77, are private wharves and the builders thereof have a proprietary and vested interest therein—at least so far as the same are constructed below the line of ordinary high water.

The power granted by the charter, authorizing the City of Portland "to build, construct, and regulate landings" at the foot of streets terminating at the Willamette river is a power to be exercised by ordinance, and does not apply to streets in the Lownsdale donation land claim, which is controlled by the reservation in the original dedication.

Laws of Oregon, 1870, p. 125, Sec. 38.

Charter and Ordinances of the City of Portland, Comp. 1879, p. 16.

In Oregon the owner of land abutting upon a navigable stream takes only to ordinary high water mark, the land lying below that mark being vested in the state.

Bowlby v. Shively, 22 Ore. 410.

Shively v. Bowlby, 152 U. S. 1.

Lewis v. City of Portland, 25 Ore. 159.

By an act of the Oregon Legislature, adopted in 1862, shore owners were authorized to wharf out in the stream, and the state thereby consented to the use of the submerged lands by the bank owners.

Bellinger & Cotton's Annotated Codes and Statutes of Oregon, Secs. 4042, 4043.

The wharves when erected under this statute are considered as aids to commerce, and lawful structures.

Parker v. Taylor, 7 Ore. 446.

McCann v. O. R. & N. Co., 13 Ore. 463.

The privilege granted by this statute was a license, which, however, became irrevocable when once acted upon.

Lewis v. City of Portland, 25 Ore. 167.

Even assuming that the city itself had the right to wharf out at the foot of Morrison street, it delegated the power, as it had the right to do.

Simon v. Northup, 27 Ore. 501.
Farnum v. Johnson, 62 Wis. 620.
Portland & Willamette Valley R. R. Co. v. Portland, 14 Ore. 188.

The power to "regulate" wharves does not include the power to confiscate them.

Chicago, Rock Island & Pacific R. R. Co. v. Joliet, 79 Ill. 44.
Amer. & Eng. Encyc. Law, (1st ed.) p. 723.
Langdon v. Mayor, 93 N. Y. 161.
State v. Mott, 61 Md. 297.
In re Hauck, 70 Mich. 396.
People v. Gadway, 61 Mich. 286.
McConnvill v. Mayor, 39 N. J. L. 44.
Sweet v. Wabash, 41 Ind. 7.
Bronson v. Oberlin, 41 Ohio St. 476.
Cantril v. Sainer, 59 Iowa, 26.

The owner of land bounded by a navigable river has the right of free access to the navigable part of the stream and the right to make a landing wharf or pier for his own use or for the use of the public. This right cannot be capriciously destroyed by a municipality by change of harbor lines.

Yates v. Milwaukee, 10 Wall. U. S. 497.

The same principle is applied in cases holding that a city must pay for obstructing a riparian owner's access to his wharf, either from the water or from the land side of his property.

Van Dolsen v. Mayor, 21 Blatch. 458, 17 Fed. 819.

Myers v. St. Louis, 82 Mo. 367.

Weber v. Harbor Comm'rs, 18 Wall. (U. S.) 57.

Demopolis v. Webb. 87 Ala. 668.

Langdon v. Mayor, 93 N. Y. 152.

The action of the city in cutting off access to the wharves by covering Morrison street with an elevated approach to the bridge is in effect a taking of plaintiffs' property without due process of law. An additional servitude was placed upon the highway.

Willamette Iron Works v. O. R. & N. Co., 26 Ore. 233.

Although the bridge is now a free public bridge, it was a private toll bridge when constructed, and no further act of the legislature with reference to the approach has been adopted since the bridge was constructed. The original act merely gave a privilege to the private bridge company, and the administrative act of the executive board of the city of Portland, which has no legislative powers, does not add to the original authority derived from the bridge act; and making the bridge a free public bridge does not change the construction which should be given to the original bridge act. The city authorities cannot change the grade of Morrison street, except by ordinance in the formal manner required by the charter of the city.

The injury to the plaintiffs is not an injury common to the public, for the reason that plaintiffs are entirely cut off from access on the land side of their wharves to the public highway, and the obstruction immediately adjoins and is against the front of plaintiffs' premises, so that as to them it is a private nuisance, for which an action will lie, or which may be restrained by injunction.

Wilder v. DeCou, 26 Minn. 11.
Schulte v. North Pac. Transp. Co., 50 Cal. 592.
Parker v. Taylor, 7 Ore. 435.
Price v. Knott, 8 Ore. 438.
Garitee v. N. Y. Balance Co., 13 How. Pr. 40.
Gould on Waters, Secs. 122, 123, 124.

The right of wharfage is a property right which can be taken only by the exercise of the right of eminent domain on making compensation to the owner of the wharfage right.

Dillon, Municipal Corporations, Sec. 107.
Crocker v. N. Y., 15 Fed. 401.
Classen v. Chesapeake Guano Co., 81 Md. 258, 31 Atl. Rep. 808.

Assuming that the ordinances granted rights in the nature of a franchise, the grant was based upon ample consideration to the city, since there was an outlay of money in making the improvements equivalent to the payment of a valuable consideration for the license, as well as other considerations required by the ordinances; so that, if it is a license, and fully executed, it is now irrevocable.

Garrett v. Bishop, 27 Ore. 349.

Even if the Bridge Act be deemed a legislative change of grade of Morrison street, which we deny, the city has not the right arbitrarily to destroy the wharf rights.

Seattle v. Columbia, etc., R. R. Co., 6 Wash. 370.

By repeated decisions in Oregon, a license, after it has been exercised and expenditures have been made in reliance thereon, is irrevocable, and if the right to erect wharves at the foot of Morrison street under the ordinances be deemed mere licenses from the city, the right granted cannot be destroyed without compensation.

Curtis v. LaGrande Water Co., 20 Ore. 34.
McBroom v. Thompson, 25 Ore. 567.
Garrett v. Bishop, 27 Ore. 352.
North Powder Co. v. Coughanour, 34 Ore. 21.
Bowman v. Bowman, 35 Ore. 281.
Hallock v. Suitor, 37 Ore. 13.
Savage v. Salem, 23 Ore. 385.

The defendants cannot close this opening in Morrison street, because of an agreement with the bridge company to leave it open, and because of the long acquiescence of the city in the plaintiffs' occupation and use of these wharves.

Having received benefits at the expense of the other contracting party, the city is estopped.

U. S. v. W. V. & C. M. W. R. Co., 54 Fed. Rep. 811.
In re Parker, 11 Fed. Rep. 397.
Commonwealth v. Andre, 3 Pick. 225.
Vidal v. Girard's Exrs., 2 How. (U. S.) 191.
Enfield v. Permit, 5 N. H. 285.
Pengra v. Munz, 29 Fed. Rep. 830.
People of Vermont v. Society for Prop., etc., 2 Paine (U. S.) 546, 560.
Cahn v. Barnes, 5 Fed. Rep. 326, 334.
Commonwealth v. Pejepscut, Proprietors, 10 Mass. 155.
People v. Maynard, 15 Mich. 470.
Menard v. Massey, 8 How. (U. S.) 313, 314.
State v. Bailey, 19 Ind. 454.
Governor, opinion of Court in response to, 49 Mo. 225.
Hitchcock v. Galveston, 96 U. S. 351.
C. N. W. R. Co. v. Elgin, 91 Ill. 251.

II.

THE SUPREME COURT OF OREGON, HAVING DECIDED THAT THE EFFECT OF THE BRIDGE ACT WAS TO CHANGE THE GRADE OF MORRISON STREET, THE SECOND SECTION OF THIS BRIEF IS DEVOTED TO A DISCUSSION OF THAT QUESTION.

It has been decided in Oregon that an abutting proprietor has no right to compensation for damage incidental to the change of grade of a city street.

Brand v. Multnomah County, 38 Ore. 79.

However this may be, the Bridge Act, of October 18, 1878, under which the authority to close the opening in Morrison street is claimed, was not intended to, and did not, change the grade of that street.

At any rate, if it did operate to change the grade of that street, it changed it only as to those portions thereof that were actually made use of for the new bridge approach. And the power to build an approach on Morrison street, to conform to the grade of Front street, was exhausted with the exercise of the right, and, after a lapse of twenty years, during which the portion of the street affording access to plaintiffs' property has remained unchanged, neither the Bridge Company, nor its successor, the City of Portland, can extend the approach to cover the opening on Morrison street or change the grade where it was not changed when the bridge was built.

The Bridge Act was not intended to change the grade of Morrison street. The Portland charter in force at the time the Bridge Act was adopted vested the city with the custody and control of the streets and with power to establish and alter their grades by ordinance after ten days' notice.

Laws of Oregon, 1864, p. 18, Secs. 78 and 79.

The Bridge Act does not in terms purport to

change the grade of Morrison street, and should not be given that construction unless necessary. An examination of the provisions of the act indicates that the grant was not confined to any definite street, and for a period of six years after the act was adopted, during which period the wharves were constructed at the foot of Morrison street, no bridge was located upon Morrison street.

When the approach to the bridge was built, if it did alter the grade of Morrison street at all, it did not do so except where the approach was built, the portion of the street not occupied by the bridge remaining upon the former grade.

The recent act of the executive board of the City of Portland, directing the city engineer to close the opening in Morrison street, cannot derive its authority from the original act, which was a grant to a private bridge company to establish a private toll bridge, for the reason that the bridge company could not now exercise the right, it having exhausted its power to establish an approach on Morrison street; nor can the authority be ascribed to the power of the city to establish the grades of city streets, for the reason that the present proceeding is not by ordinance after notice and hearing as prescribed by the terms of the present charter of the city.

Laws of Oregon, 1898, pp. 150, 165.

The Bridge Act was in effect a "float," and may be likened to the congressional grant of lands to a railroad company. By its terms, it was not to be a vested, granted franchise until the conditions precedent had been fulfilled.

When the bridge was located and the amount of space in Morrison street to be appropriated was determined upon, the election was final, and other portions of the street were excluded.

Van Wycke v. Knevals, 106 U. S. 360.

This is merely a statement of a familiar rule of easements.

Jennison v. Walker, 11 Gray (Mass.) 426.

Bannon v. Angier, 2 Allen (Mass.) 128.

Ev. L. St. J. O. H. v. Buf. Hydraulic Assn., 64 N. Y. 564.

Onthank v. L. S. & M. S. R. R. Co., 71 N.Y. 194.

Warner v. R. R. Co., 39 Ohio St. 72.

Willis v. Winona City, 59 Minn. 27 (60 N. W. Rep. 814).

See also

Allen v. Board of Freeholders, 13 N. J. Eq. 68.

Moorehead v. Little Miami R. R. Co., 17 Ohio, 340.

Griffen v. House, 18 Johns. (N. Y.) 397.

Cayuga Bridge Co. v. Mager, 6 Wend. (N. Y.) 85.

State v. Norwalk Turnpike Co., 10 Conn. 157.

Blackemoore v. Glamorganshire Canal, 1 Mylne & K. 154.

ARGUMENT.

I.

The original townsite proprietor, Lownsdale, expressly reserved "the wharves and wharving privileges to the owners of the claim."

This right, we assume, passed by deed to the riparian owners. A deed to the water lots in blocks 76 and 77 carried the right to wharf out in front of the lots, and it is alleged in the complaint that the plaintiffs are the owners of this right. This was a right to be enjoyed by the original owner and his successors, including plaintiffs. But it was not a right to be enjoyed by the city as riparian proprietor by virtue of its use of the public streets. The dedication of city streets on the plat did not give the city the right to build or maintain a wharf at the foot of the street, for the dedication expressly reserved this right.

The Right of Owners of the Blocks 76 and 77 to Build Wharves Was Reserved by the Dedication, and Is a Proprietary Right, Not Derived From License of the City.

All that the city could do, and all that it attempted to do by its ordinances, was to authorize the riparian owners to build their wharves. The city had the power to regulate the manner in which wharves were to be built by the riparian owners. And an examination of the ordinances shows that the permit to build the wharves does not assume or assert any proprietary right in the city. It seems to be taken for granted by the ordinances that the lot-owners would own and control the wharves when built.

The owners of the abutting lots on Morrison street not only had all the rights that the original townsite proprietor had to wharf out into the river to the

harbor line or to water deep enough to accommodate vessels in front of their lots, but also owned the fee of one-half of Morrison street, fronting their lots, subject only to the rights of the public in the street for travel and other incidental public uses. This latter right of the public, or of the city, did not include the right to wharf out at the foot of the street, for, as already shown, this right was reserved, and passed to the abutting lot-owners.

Conveyance by a proprietor of an addition to a town of a lot or block bounded by a street conveys the fee to the center of the street, subject to the public use.

Banks v. Ogden, 2 Wall. (U. S.), 57.

And the rule of law is recognized by the decisions of the Supreme Court of Oregon.

Huddleston v. Eugene, 34 Ore. 243-352.

McQuaid v. Portland Ry. Co, 18 Ore. 237.

The right of wharfage, therefore, at the foot of Morrison street, which was originally in Lownsdale, was a proprietary right of the owners of blocks 76 and 77, to be exercised subject to the right of the public to use Morrison street as a way.

This right of wharfage was exercised with the consent of the city.

It is a situation quite different from that shown in cases where there was no reservation of the wharfage right, and where it is therefore held that a wharf built by a city at the terminus of a street is part of the street, free to the public, and not subject to a private use for which wharfage may be taken.

Russell v. The Empire State, Newb. 541; Fed. Cas. No. 12, 145; 21 Fed Cas. 23.

The Geneva, 16 Fed. Rep. 874.

Barney v. Baltimore, 1 Hughes, 118; Fed. Cas. No. 1029; 2 Fed. Cas. 886.

In the Lownsdale claim, the city had no right to build wharves at the foot of a street, and the provision of the charter of the city conferring the right to build wharves is to be construed to apply to places in the city where the municipality was a riparian owner, and to such of its streets terminating at the river as lie outside of the Lownsdale claim.

We freely admit that the legitimate and proper use of a street terminating at the river is as a landing place, and that with or without the express charter provision, the city would usually have the right as a municipal corporation to build wharves at the termini of its streets; but we claim that this does not apply where the right of wharfage is reserved.

1 Dillon, Municipal Corporations, par. 109.

We insist, therefore, that the wharves when constructed by the lot-owners, were constructed, not in behalf of the city, but as the private property of the persons who erected them. Yet, in asserting this, we do not deny that the public had certain rights upon and over the wharves at the foot of the street. It is possible that in so far as the wharf at the end of the street extended above the line of ordinary high water it was merely a part of the street, and entirely free from private ownership. The complaint, while it charges (Abstract, p. 23) that the wharf and wharfing privileges, with the right of access to and egress from the same by Morrison street, are property, and property rights which plaintiffs own, and are vested rights of great value, also alleges (Abstract, p. 14) that "*the portions of said Morrison street* so occupied by said wharves and said roadway have been and are now improved and used as, and the same are, a public street and highway."

In other words, while the plaintiffs claim proprietary and vested rights in the wharves at the foot of

the street, they do not dispute the rights of the public in the highway itself, or claim an exclusive use of the *street*. Perhaps the plaintiffs' position on this point can be best shown by quoting the following paragraph of the complaint (Abstract, p. 14):

"That said wharves, docks, and warehouses and said approach thereto from Front street have been constructed, maintained, and used for more than 20 years by plaintiffs and their respective predecessors in interest and their tenants, and at all of said times said wharves and docks, constructed in pursuance of said ordinances have been used as landing places for boats and vessels navigating the waters of the Willamette river and by people and teams having business at said docks or wharves, *and in addition thereto said docks and wharves, upon and over said Morrison street and said approach thereto from Front street, so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public.*"

And (on page 23) the complaint further claims as follows:

"Plaintiffs further state that said wharf and wharfing privilege with the right of access to and egress from the same by Morrison street are property and property rights which they own, and the same and the rights and privileges granted under and by virtue of said ordinances are vested rights and of great value." * * *

So far as the street is concerned, and any part of the wharves that are actually upon the street, the plaintiffs claim no exclusive proprietary interest. But below the terminus of the street, extending to deep water, lies an expensive structure that is private property. These wharves below the line of ordinary high water, which was the boundary of the Lowns-

dale donation land claim, are built, as will be more fully shown below, with the consent of both the state and the city, and they are neither public wharves nor a property that can be taken or destroyed without compensation to the owners.

This is in entire harmony with the language of the ordinances themselves, which, while authorizing the owners to construct the wharves at the foot of Morrison street, and to construct certain passageways in the street, provide that "*the passageway and all those portions of said wharf extending over and into the street* shall be subject to regulation by the common council *as part of said street and sidewalk.*" (Abstract, pp. 11 and 13.)

Now, the learned Supreme Court of Oregon, in its opinion in this case assumed, and it seems to us erroneously, that because the ordinances do not in and by themselves purport to be a grant of proprietary rights, the plaintiffs have no greater or different right in the locus than the public generally. This entirely overlooks the fact that the private right of wharfage existed long before the ordinances and does not owe its birth to any action of the city council. We quote from the opinion (Abstract, p. 44):

"The reasonable interpretation of these ordinances is that they were intended to regulate the construction of wharves by the property-owners on either side of the street in front of their property, with permission, perhaps, to extend the lower floors of such wharves over and across the foot of Morrison street, for the purpose of affording access from the street to the wharves. There is, however, no grant of any privilege or right to use or appropriate the street or an extension thereof for wharfage purposes. On the contrary, the street and any improvements which may be put there by the abutting property-owners

were reserved to the use of the entire public, and the grantees had no greater rights under the ordinances than those enjoyed by the general public. * * * If the grantees acquire no other or greater rights or interests in the street than the general public, the fact that they have expended money in extending the street into the river, or building approaches therein to their wharves, or in otherwise improving it, does not give them a right to compensation for the loss or inconvenience caused by a change in the grade any more than a change in the grade would entitle an abutting property-owner to compensation because he had previously improved a street in front of his property by the authority of the city. The grantees acquired no private rights under the ordinances, and the construction by them of the wharf and landing at the foot of the street was merely an extension of the street, which did not vest in them any rights other than those they may have had as a part of the general public: Hoboken Land & Improvement Co. v. Mayor of Hoboken, 36 N. J. L. 540. The fact that by reason of the proximity of their property to the street they were enabled to make more use of it and its extension than others did is a mere difference in degree and not in kind."

Now, assuming that the proposition of law, that if the grantees have no greater interest in the wharves than the public, they have no right to compensation for the loss or inconvenience caused by a change in grade of the street, is correct, still it has no application to the facts as stated in the complaint. Whether the ordinances do or do not purport to grant a privilege or right to use or appropriate the street or an extension thereof for wharfing purposes, the right exists, and it existed because of the reservation in the plat, long before the ordinances; and it exists

independent of any action of the city. This right is different in kind from the right of the public to use the street. And it is a valuable right which can not be taken away or destroyed without compensation.

THE POWER OF THE CITY TO BUILD WHARVES.

It is true that by the charter the City of Portland, at the time of the passage of the ordinances, had not only the power to regulate the building of wharves, but had also the express power to build and construct wharves.

By Section 38 of the charter of the City of Portland of 1870 (Laws of Oregon, 1870, p. 125), the city had power:

"To build, construct and regulate landings at the foot of the streets terminating at the Willamette river."

The charter also provided (Charter and Ordinances of the City of Portland, Compiled 1879, p. 16):

"The power and authority given to the council by Section 38, can only be enforced or exercised by ordinance, unless otherwise expressly provided; and a majority of the council may pass any ordinance not repugnant to the laws of the United States, or of this state, necessary or convenient for carrying such power and authority, or any part thereof, into effect."

These provisions of the charter were in force at the time of the passage of these two ordinances, and have been continued in substantially the same form in all subsequent charters of the City of Portland.

But this legislative grant to the municipal corporation of power to build could not apply to streets in the Lownsdale claim, which covers but a small part of the area of the city. As to streets terminating at the river within that claim, the reservation of the original proprietor in the dedication controls both

the legislature and the municipal corporation, and the legislative grant of power in the charter to build wharves must be construed as though expressly restricted to such streets as are not within the reserved limit.

THE STATE AUTHORIZED SHORE OWNERS TO ERECT WHARVES IN FRONT OF THEIR PROPERTY.

It is the law of the State of Oregon that the owner of land abutting upon a stream, like the Willamette, takes only to ordinary high water mark, which is the limit of his ownership, the land lying below high water mark being vested in the state.

Bowlby v. Shively, 22 Ore. 410.
Shively v. Bowlby, 152 U. S. 1.
Lewis v. City of Portland, 25 Ore. 159.

Early in the history of the state, however, the legislature passed an act authorizing the construction of wharves by the upland owner in front of his property, in incorporated towns, subject to regulation by the municipality. This legislation was adopted in 1862, and has ever since been continued in force. It is embodied in Sections 4042 and 4043 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which are as follows:

"Section 4042. The owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or boats or vessels that may or can navigate such stream or other like water."

"Section 4043. The corporate authorities of the

town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege or franchise herein granted; and upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authorities shall, by ordinance or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any further into such stream or other water beyond such low water line than may be necessary and convenient for the purpose expressed in Section 4042, and so that the same shall not unnecessarily interfere with the navigation of such stream or other like water."

This legislation was not intended to be solely in the interest of the riparian owner, but had in view also the public purpose of developing the commerce and navigation of the state. The wharves erected were regarded as aids to commerce, and were lawful structures.

Parker v. Taylor, 7 Ore. 446.

McCann v. Ore Ry. & Nav. Co., 13 Ore. 463.

The privilege granted by these sections was a license, which, however, became irrevocable when once acted upon. This is expressly decided by a strong case in the Oregon reports.

In Lewis v. City of Portland, 25 Ore. 167, it is said:

"It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves is merely a license, and, as such, may be revoked at the pleasure of the state, after it has been acted upon, and the wharf erected. This is not so. As was said in Bowlby v. Shively, 22 Ore. 410, the statute does not vest any right until

exercised; it is a license revocable at the pleasure of the legislature until acted upon and availed of. It is doubtless true that if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands to deep water, unless acted upon, or availed of, would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested — have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which can not be taken without due process of law, and due compensation therefor. Hence, the contention of the defendants that the Muessdorffer Act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, can not be maintained."

Under Section 4043, it will be observed, the municipality was granted "power to regulate the exercise of the privilege or franchise herein granted," and could also "prescribe the mode and extent to which the same may be exercised beyond the line of low water mark," to the end that such wharf or wharves might not be constructed beyond the low water line further than was necessary for the purpose specified in Section 4042, or so as not unnecessarily to interfere with the navigation of the stream. An examination of the ordinances under consideration will indicate how very effectually the City of Portland undertook thereby to regulate the exercise of the privilege by the land-owner of building a wharf in front of his property.

IF THE CITY HAD THE RIGHT TO WHARF OUT AT THE FOOT OF MORRISON STREET, IT DELEGATED THE POWER.

This power of the city to improve the facilities for commerce at the foot of the streets terminating at the Willamette river has been freely exercised, *but in all cases that have occurred within the Lownsdale claim, so far as we are aware, not by the city itself, but by some third person to whom the privilege has been delegated.* Sufficient evidence of this fact is afforded by the various ordinances of the city of Portland to that effect. What was the purpose of these ordinances? Was it contemplated that the rights conferred could be revoked at pleasure, notwithstanding the expenditures of the grantee? Clearly not. The only reasonable conclusion is that the city intended to confer and the grantee expected to acquire a privilege, which by user and the expenditure of money would be beyond recall at the pleasure of the city. Upon no other theory can we account for the acceptance of these ordinances and the improvements made by the beneficiaries thereunder.

Nor, if the city has authority to build a wharf at the foot of Morrison street, would it be prohibited from delegating this power to another.

Simon v. Northup, 27 Ore. 501.

Farnum v. Johnson, 62 Wis. 620.

The case of P. & W. V. R. R. Co. v. Portland, 14 Ore. 188, affords a pertinent illustration of the delegation of this authority by the legislature directly to a private corporation, a railroad. It is said on page 198:

"As we have construed the act, it only in effect purports to grant to the defendant—to adopt the language of Mr. Justice Deady—'*the right to improve*

and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith.' Now, will not the construction of wharves and warehouses, at which vessels may load and discharge cargo, be rather an improvement of its use as a levee or public landing, than its subversion as such? Are not these things, in fact, necessary and essential to afford proper facilities to the public, and make the levee of any value and benefit as a public landing? Are they not in accord with the general purposes for which the property was dedicated? Do they not, in fact, contribute to give it more identity as a public landing, and render the use it was dedicated to serve more beneficial to the general public?

"Nor does the construction of a depot thereat, in connection with the railway, subvert or destroy its use as a public landing, nor is it inconsistent therewith; but, within proper limitations, it may tend to improve and make the use of the levee, as such, more beneficial. 'A landing is a place on a river, or other navigable water, for lading and unlading goods, or for the reception and delivery of passengers.' (State v. Randall, 1 Strobt. 111.) 'It is neither the bank nor the wharf, to or from which persons or things may go from or to some vessel in the contiguous waters.' (State v. Graham, 15 Rich. 310.) See also, Coffin v. City of Portland, *supra.*) *Now, are not all these things, and may they not be so constructed—wharf, warehouse and depot—as proper incidents to a public landing, which improve and facilitate its use, extend its benefits to a larger public and make it more suitable for the accommodation of passengers, and the stowing and shipping of general freight? The legislature, as the representative of the general public, has the right to regulate its use and improve the same, consistent with the purposes of its dedication;*

and it may do this directly, or authorize the defendant to do it as agent of the state."

It will be borne in mind in regard to this case just quoted from that it related to public property of the city, a public levee, and the streets intersecting the same. The decision not only relates to the land down to high water, but also necessarily to that portion extending outward into the river from high water mark to the edge of the wharves. It will be noticed that by subdivision 2 of section 1 of the act under consideration in that case, the railroad company was authorized to sell the property as an appurtenance to its railway, but it was provided "that said company shall never charge dockage to any boat, ship, or vessel while actually engaged in receiving and discharging cargo at any wharf which may be erected on said property."

THE POWER TO "REGULATE" WHARVES DOES NOT INCLUDE THE RIGHT TO CONFISCATE THEM.

In the City Charter of 1870, in these ordinances, and in sections 4042 and 4043 of Bellinger and Cotton's Code, certain powers of "regulation" are reserved to the city. The power to "regulate," however, is far from being the same thing as the power to suppress or prohibit. The wharves when built cannot, by an administrative act of the city officials, be cut off from access and rendered valueless.

In C. R. I. & P. R. R. Co. v. Joliet, 79 Ill. 44, it is observed:

"Some stress is laid upon a certain proviso in the ordinance of the common council, of January 3, 1853, before referred to, which is as follows: 'Provided, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city.' That only means that

the company shall be subject to all reasonable and legal ordinances for the *regulation* of the road. It had no such scope, that the railroad company should abandon or take up and remove its track at the bidding of the common council."

In 20 Am. & Eng. Encyc. of Law (1st ed.), head "Regulate," p. 723, it is said:

"A power to 'regulate' does not properly include a power to 'suppress' or 'prohibit,' for the very essence of regulation is the existence of something to be regulated."

Langdon v. Mayor, 93 N. Y. 161.
State v. Mott, 61 Md. 297.
In re Hauck, 70 Mich. 396.
People v. Gadway, 61 Mich. 285.
McConnvill v. Mayor, 39 N. J. L. 44.
Sweet v. Wabash, 41 Ind. 7.
Bronson v. Oberlin, 41 Ohio St. 476.
Cantril v. Sainer, 59 Iowa, 26.

THE CLOSING OF MEANS OF ACCESS IS CONFISCATION.

Now, it has been held that the owner of land, bounded by a navigable river, has the right of free access to the navigable part of the stream, and the right to make a landing wharf or pier for his own use or the use of the public. This right cannot be capriciously destroyed by a municipality by a change of harbor lines.

Yates v. Milwaukee, 10 Wall. (U. S.) 497.

The same principle is asserted in cases holding that a city must pay for appropriating a riparian owner's access to tide-water by filling in tide land in front of his property.

Van Dolsen v. Mayor, etc., 21 Blatch. 458, 17 Fed. 819.

See also as bearing on this rule generally,

Myers v. St. Louis, 82 Mo. 367.

Weber v. Harbor Comm'rs, 18 Wall. (U. S.) 57.

Demopolis v. Webb, 87 Ala. 668.

Langdon v. Mayor, 93 N. Y. 152.

The right of access to the wharves from the land side is as important and as valuable as from the water side. The city has no more right to appropriate a wharf and wharf rights by shutting off the street than by obstructing access by water.

We will later in this brief discuss the contention of the defendants that the effect of the Bridge Act of 1878 was to change the grade of Morrison street, and that the damage to plaintiffs' property is consequential, due to the change of grade, and not such as can be recovered under the Oregon constitution and the decisions of the Oregon courts.

We are here claiming that the plaintiffs' rights in the wharf at the foot of the street, being vested property rights, include the right of access by Morrison street, and that the order of the city authorities, cutting off access by covering of the street with an elevated approach to the bridge, is in effect a taking of plaintiffs' property without due process of law, in violation of their rights guaranteed by the amendments to the constitution of the United States. It placed an additional servitude upon the highway.

The Bridge Act of 1878 was a grant to a private corporation to build a toll bridge. The approach was to conform to the grade of Morrison street. When built, this approach was a part of the bridge, and although it was also open to public travel, it was manifestly of no use except as a means of access to the toll bridge. The structure interfered with the light and air of the abutting proprietors. It interfered with ready access to their property. In other

words, the situation, when the approach was first built, was exactly that described in the Oregon case, Willamette Iron Works v. O. R. & N. Co., 26 Ore. 233, in which the Supreme Court of Oregon held a legislative act authorizing such an approach to another toll bridge in the city was not a legislative change of grade, but had the effect of placing a new servitude upon the street in violation of the abutting owner's constitutional rights.

We quote from the case at page 228:

"An abutting proprietor is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking within the meaning of the constitution, whether the fee of the street is in the abutting owner or not. He holds his property subject to the power of the proper legislative authority to control and regulate the use of the street as an open public highway, and hence any authorized use thereof, though a new one, gives him no cause of action. But such holding is not subject to the legislative power to divert the street from legitimate street purposes by authorizing a structure thereon which is inconsistent with its continuous use as an open public street. Any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made: Elliott on Roads and Streets, 526; Tiedeman on Municipal Corporations, 301; Lewis on Eminent Domain, Sec. 126; Booth on Street Railway Law, Secs. 80, 81; 2 Dillon on Municipal Corporations, Secs. 711, 712, 723c; McQuaid v. Portland and Vancouver Railway Company, 18 Ore. 237, 22 Pac. 899; Story v. New York Elevated Railroad Company, 90 N. Y. 122, 43 Am.

Rep. 146; Lahr v. Metropolitan Railway Company, 104 N. Y. 268, 10 L. R. A. 133, 28 N. E. 640; Corning v. Lowerre, 6 Johns. Ch. 439; Barney v. Keokuk, 94 U. S. 324; State v. Mayor of Jersey City, 52 N. J. L. 65, 18 Atl. 586, 696. As said by Andrews, J., in Kane v. New York Elevated Railroad Company, 125 N. Y. 165, 11 L. R. A. 640, 26 N. E. 278: 'However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar rights, facilities, and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property of which he can not be deprived by the legislature or municipality, or by both combined, without compensation.' And in Story's Case, 90 N. Y. 122, 43 Am. Rep. 146, the rule is thus stated by Tracey, J.; 'While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open and public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized.'

"This brings us to the question, then, whether the occupation of Third street by the approach to defendant's bridge is compatible with or destructive of its use as an open public street. As already stated, this street is about sixty feet in width, and the approach complained of is practically a solid structure thirty feet wide in the middle of the street, so that no use can be made of that portion of the street occupied by it except by persons desiring to use defendant's bridge and pay toll therefor. In other words, it is in fact an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor. The plaintiff and the public are absolutely and permanently excluded

from the use for general street purposes of all that portion of Third street covered by the approach. It practically terminates the street as an open public thoroughfare at the north line of G street, in place of the north line of H street as it is laid out and dedicated; and the only roadway in front of plaintiff's property is but a few feet wide, and quite insufficient for the proper and necessary use of such property, or for the accommodation of public travel. While the city authorities undoubtedly have power to authorize the use of the street for legitimate street purposes, we do not think the public can justly demand or require such a sacrifice of private interests, or justify such an exclusive and permanent appropriation of a street in aid of a private enterprise, although for public purposes, as is contemplated in this case. It may be conceded that the general interests of Portland and the public at large are promoted by the appropriation of the street to the purposes of an approach to defendant's bridge; but it by no means follows that the burden of such a public improvement can rightfully be cast upon this plaintiff by appropriating its property for the public benefit, without compensation. We think, therefore, that while it is competent for the legislature or municipality to authorize the use of a street for legitimate street purposes, without making compensation to abutting owners for consequential injuries to their property, they can not legally authorize structures of the character complained of to be erected thereon for the use and convenience of a private corporation, and which absolutely and permanently exclude the public and the abutting owner from the portion of the street so occupied, without compensating the adjoining proprietor for the injury sustained.

"The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The City of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant

permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was an exercise of the power to alter or change the grade of the street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade."

Now, it is true, since the approach of the Morrison-street bridge was built, the bridge has become a public bridge and is no longer a toll bridge; and the claim is now made that being a public and free bridge, the approach is Morrison street itself.

But the executive board of the city has no legislative powers. It has no power to pass an ordinance changing the grade of a city street, and did not pretend to adopt such an ordinance, or to exercise the right of the council of the city to change the grade, after notice, etc., as required by the city charter. Their act in adopting the resolution directing the city engineer to close the opening in the street was purely administrative, and relates back to the bridge act for authority, claiming, as does the Supreme Court of Oregon in its decision in this case, that the bridge act changed the grade of Morrison street by permitting the building of the approach in the street. So that, if the bridge act does not change the grade, the grade is not changed, and the present action of the city officers

is without authority. Yet, at the time the approach was built, the bridge was a private toll bridge, and the facts were not to be distinguished from those in the Willamette Iron Works case just quoted.

The structure in Morrison street built in 1886, under authority of the legislature as a means of access to the private toll bridge, interfered with the rights of the abutting property-owners, and no doubt if suit had then been begun, an injunction would have been issued as it was in the Willamette Iron Works case. No further legislative act, either of the city or the state, has been adopted since that time, except to provide that the city acquire and make free the bridge in question. Making it a free public bridge does not change the construction that should be given to the original bridge act, or authorize the city authorities to change the grade of Morrison street except by ordinance in the formal manner required by the charter of the city. The resolution of the executive board of the city is a taking of the plaintiffs' property without due process of law and without compensation.

THE PLAINTIFFS SUFFER A DIRECT INJURY, DIFFERING FROM THAT OF THE PUBLIC, AND ARE ENTITLED TO AN INJUNCTION.

Whatever the rule may be as to abutting lot-owners and their right to damages in case of change of grade of a street, the obstruction of the street here is a private nuisance for which the plaintiffs have a remedy by injunction.

In this case the plaintiffs do not suffer in common with the general public. Their injury is direct and peculiar, for the reason that they are entirely cut off from access on the land side of their wharves to the public highway. The obstruction immediately adjoins and is against the front of plaintiffs' premises, and as

to them it is a private nuisance for which an action will lie, or which may be restrained by injunction.

Wilder v. DeCou, 26 Minn. 11.
Schulte v. North Pac. Transp. Co., 50 Cal. 592.
Parker v. Taylor, 7 Ore. 435.
Price v. Knott, 8 Ore. 438.
Garitee v. N. Y. Balance Co, 13 How. Pr. 40.
Gould on Waters, Secs. 122, 123, 124.

The ordinances vested the plaintiffs with rights *not enjoyed by the general public.* As observed in Dillon's Municipal Corporations (4th Ed.), Section 107:

"But the right of wharfage held by a grantee under a valid city grant, although it is an incorporeal right, is nevertheless a property right which can only be taken by the legislature by the exercise of the right of eminent domain on making compensation to the owner of the wharfage right."

Crocker v. New York, 15 Fed. Rep. 401.
Classen v. Chesapeake Guano Co., 31 Atl. Rep. 808; 81 Md. 258.

CONSIDERATIONS MOVING TO THE CITY AND THE LOT-OWNERS UNDER THESE ORDINANCES.

If it is necessary to consider the ordinances as granting a privilege or franchise, the consideration, so far as the city is concerned, is clear. There was an expenditure of a large sum of money by the grantees of the franchises. The wharves, when built, aided the city in its general policy of developing its commerce, in which policy not only the individual wharf proprietors but also the community at large were interested. The wharves at the foot of Morrison street and the roadway leading thereto accommodated the public travel. The pontoons which were required to be constructed at the foot of the street enabled the public

to use the wharves as landing places for small boats. A suitable trap was required to be kept in the lower roadway for fire purposes. All these public conveniences were constructed and have been maintained at the expense of the grantees of the franchises and their successors, *without one dollar of expense to the city or the public.* There is thus abundant consideration accruing to the city, if consideration were a material feature in this case.

Now let us view this question of consideration from the stand-point of the so-called grantees:

In the case of Garrett v. Bishop, 27 Oregon, 349, it is observed: *"The principle contended for assumes that the outlay of money in making such improvements is equivalent to the payment of a valuable consideration for the license, which, having been executed, becomes irrevocable."*

The wharf within the property lines would have been of relatively small dimensions, as its area would be only that of two city lots. The wharves in front of the property line and in the adjacent half of the street were not separate and distinct wharves; *but they constituted one structure, covering the two lots of the abutting owner and the adjacent half of the street.* Thus, one ordinance describes the wharves as follows: "The easterly line of said wharf to commence at a point 147 feet east of the east line of Front street and running from the center line of Morrison street extended in a direct line to a point 130 feet south of the center line of Morrison street extended at a distance of 137 1-2 feet from the east line of Front street." The other ordinance uses similar language.

The part of the wharf at the foot of the street was perhaps subject to public use, but it is none the less true that the structure, when completed, was one entire structure, capable of being used as such

wharves commonly are. The grantees of the franchise did not build the wharves gratuitously, but in reliance upon the advantage of having a continuous and unbroken wharf. They might have built their wharves differently if they had not relied upon the authority given them to use the street and the wharf at the foot of the street in connection with the use of the wharves in front of their own property. What was the right thus vested in them? Manifestly, that they could use their wharves as landing places for boats and vessels, and for the discharge and loading of passengers and freight; and for such services they were entitled to receive tolls and compensations. The wharf in the street which formed a part of their structure enabled them, as a matter of right, to accommodate vessels of larger dimensions than they could have accommodated had the wharves been limited to the property lines, and thus to receive tolls from a class of vessels which, but for the wharves in the street, would not in all probability have visited their wharves at all. The portion of each wharf in the street was only 30 feet wide. It could only accommodate small boats; larger vessels could not land there without the consent of the owners of the contiguous private wharves, because the vessels would overlap the wharves in front of the plaintiffs' property.

It would accordingly seem that the plaintiffs enjoyed a privilege in these wharves not enjoyed by the public, and that the right to use the wharves at the foot of the street as a part of the entire structure was a material and very important inducement and consideration for making the improvements. Under these circumstances, can it well be said that the closing of that portion of the street which affords access to these lower wharves, or the doing of any act which interferes with the use of such wharves, does not

deprive plaintiffs of something not possessed by the public?

If the opening in the approach on Morrison street is closed, the result will be not only to deprive plaintiffs of the use of the roadway and the wharves in the street, but also to cut off all means of access to the lower wharves on their own property, and to impair their value and utility.

THE RIGHT TO GRADE STREETS IS SUBJECT TO LIMITATIONS.

It may be true that the city possesses power to alter or establish the grade of streets. But is it true that this right is in *all* cases an unlimited right? Take the case of a street railway franchise. Is the city entitled to so act as to absolutely destroy the franchise, without compensation? The idea is well illustrated by the case of Seattle v. Columbia, etc., R. R. Co., 6 Wash. 370, where it is said:

"A city's power to improve and graduate its streets is undoubtedly a continuent power, not exhausted by its first exercise, and inalienable by the corporate authorities, and such authorities are the ones to judge of the expediency or necessity of its exercise. This is well sustained by the cases cited. But the next statement that under this power the city's right to establish and execute a new and higher grade of Columbia street at the place in dispute follows as a matter of course, must be taken with some degree of limitation. It will aid in the discussion of this question to state our views here of the effect of the city's action in the premises. The raising of the grade of the railway tracks two feet at the point in question would greatly impair the usefulness of the tracks. This clearly appears from the proof, and it also appears that at the same time the city raised the grades of other streets

in the vicinity which were crossed by the railroad tracks aforesaid to such an extent as to make it impossible for the railroad companies to reconstruct their tracks upon said right of way. *The effect of the raising of the grades of these various streets was such as to absolutely destroy the franchise*, let alone making it impossible for the railroad companies to comply with the ordinance in question, in giving to each wharf owner a sidetrack, and to construct the tracks on a common level with the wharves along the waterfront. Under such a state of facts, *we think the well settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It can not be exercised to the extent of working a destruction of such a franchise previously granted.* This would amount to an unauthorized taking of property; and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistent with the preservation of rights previously acquired by others."

The court further said, at page 392:

"Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the con-

trary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents. State v. Noyes, 47 Me. 189; Port of Mobile v. Louisville, etc., R. R. Co., 84 Ala. 115 (4 South. Rep. 160)."

IN OREGON A PAROL LICENSE, AFTER IT HAS BEEN EXERCISED AND EXPENDITURES HAVE BEEN MADE IN RELIANCE THEREON, IS IRREVOCABLE.

We have earnestly claimed that the ordinances in question do not originate the plaintiffs' right to build wharves at the foot of the street. But if those ordinances are to be deemed to grant a license or easement, the right is irrevocable.

In the case of Curtis v. La Grande Water Co., 20 Oregon, 34, the question was very fully considered by the Oregon Supreme Court. On page 43 it is said:

"The next and main defense is that the defendant constructed its dam and laid the pipes on the land and diverted the waters for the uses specified, at the place designated on the stream, by the permission or under a license from Arnold, who was then the owner of the land through which the stream flowed, and that in consequence of large investments of money and labor expended in the construction of such dam and laying such pipes for the purpose of diverting the

waters of that stream, the license has become irrevocable, or turned into an agreement which equity will enforce. The principle on which this contention is based is, that after one has acted on the faith of a parol license and made permanent improvements, the owner will be estopped from revoking his license to prevent injustice. The application of this principle of equitable estoppel after one has acted on the faith of a parol license is strongly resisted by some authorities holding, in effect, that it operates to overturn the statute of frauds, and, for all practical purposes, to create an interest in land in disregard of the requirements of that statute. A license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the pleasure of the party giving it; and is revocable unless executed under such circumstances as would authorize the interference of equity to prevent injustice. At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by estoppel, as courts of law deal with the legal aspect of estates in land, and can not enforce equities which grow out of an equitable estoppel against the owner of land.

"Judge Cooley seems to regard it as a serious reproach to the law that it should fail to provide some adequate protection against the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements. (Maxwell v. Bridge Co., 41 Mich, 467.) But it is unnecessary for us to consider the effect of such a position at law, as it is only the equitable rights of the parties that are now under inquiry. *An executed license is treated like a parol agreement in equity; it will not allow the statute to be used as a cover for fraud; it will not permit advantage to be taken of*

the form of the consent, although not within the statute of frauds, after large expenditures of money and labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given or had the effect to influence the conduct of another and cause him to make large investments, would operate as a fraud and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. The ground of the jurisdiction is to prevent injustice or fraud. 'Its effect,' said Chancelor Bates, 'when applied, is to restrain a party from exercising his legal right; and this even a court of equity can not do unless there has been on his part some conduct, declaration, or improper concealment misleading an innocent person to his prejudice, and rendering the assertion of the legal right as against such person an act of bad faith amounting to constructive fraud. Moreover, it may be well added that, to warrant the interference of the court with the legal right or title of the party, the case relied on to work the estoppel must be clear, beyond doubt, upon the facts; and the more stringently do these rules apply in a case * * * where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege, temporary and revocable, into an easement in the licensor's land, perpetually binding it, and transmissible from the licensee."

In McBroom v. Thompson, 25 Oregon, 567, the principle of Curtis v. La Grande Water Co. is approved and followed. The court there says:

"While it is claimed that the better rule, in view of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the licensor may revoke the parol license after an

outlay under it (Bigelow on Estoppel, 666), the contrary doctrine has, by the foregoing decisions, been firmly established in this state. The reason for the estoppel in such cases rests upon the principle that the licensee, after the expenditure of money and labor on the faith of the parol license, can not be placed in statu quo upon its revocation: 2 Herman on Estoppel, Sec. 982. The defendants having expended their money and labor in digging the ditch upon the faith of Crego's parol license, it follows that he could not revoke it after such expenditure."

And again, in Garrett v. Bishop, 27 Oregon, 352, it is stated:

"It is contended that a parol license can not be revoked after it has been executed by the licensee, who, relying upon the faith of the privilege conferred, has expended money in making valuable, permanent improvements. *The principle contended for assumes that the outlay of money in making such improvements is equivalent to the payment of a valuable consideration for the license, which, having been executed, becomes irrevocable, and is converted into an agreement which equity will enforce, upon the theory that the licensor, having encouraged the improvements which have been made upon the faith of the license, is estopped by his conduct from asserting his strict legal rights. * * * The execution of a parol license, while relying on the faith of it, supplies the place of a writing, and takes the case out of the statute of frauds.*"

And yet again in North Powder Co. v. Coughanour, 34 Oregon, 21, it is observed:

"If Coughanour, relying upon Welch's representations, materially aided the latter in constructing the ditch, whereby the water was diverted and appropriated for a particular purpose, the parol license thus

granted, having been fully executed, would be irrevocable, in view of which the better reason in our judgment supports the theory that a court of equity would enjoin the licensor from interfering with the free exercise of the right he had thereby conferred: Washburn Easem., *560."

And to the same effect is Bowman v. Bowman, 35 Oregon, 281, where it is said:

"If the evidence bore out this contention, a reversal of the decree would necessarily follow, *for the rule is well settled in this state that a parol license can not be revoked after the licensee has expended money or performed labor in making valuable and permanent improvements on real property upon the faith of such license.*"

See also Hallock v. Suitor, 37 Oregon, 13.

Savage v. Salem, 23 Oregon, 385.

We have quoted fully from these decisions because they are all controlling. They announce the law of Oregon which is applicable to this case, regardless of what the law may be elsewhere, and the repeated expressions of the court at different times give to the principle announced an effect which at this late day can not well be overcome. If the ordinances be regarded as licenses to construct wharves in Morrison street, the rights conferred have become irrevocable by user, and the expenditures made by the grantees.

A fortiori, the rule applies where the grant is made in formal manner, as by ordinance.

DEFENDANTS CANNOT CLOSE THIS OPENING IN MORRISON STREET, BECAUSE OF THE AGREEMENT WITH THE BRIDGE COMPANY TO LEAVE IT OPEN, AND BECAUSE OF THE LONG ACQUIESCENCE OF THE CITY IN PLAINTIFFS' OCCUPATION AND USE OF THESE WHARVES.

(1) When the approach to the bridge was constructed, and thereafter, the bridge company agreed to leave an opening in the approach so as to permit of the use of the roadway leading from Front street to the lower docks. The bridge company was clearly authorized to enter into such agreement, and when made, the same was binding upon it and its successors in interest, just as any other private party would be precluded from questioning any agreement which it could lawfully make and did make. The bridge company was the beneficiary of the act of 1878, authorizing the construction of the Morrison-street bridge, and it could determine how far it would exercise the privileges granted. When it agreed to leave this opening it could not thereafter close it.

The bridge company, notwithstanding the grant by the bridge act, had neither the right to set a pier of the bridge in front of the plaintiffs' wharves, nor to close up the landward means of access to those wharves, and the agreement stated in the complaint was based upon a valuable consideration.

The city acquired the Morrison-street bridge under the provisions of the act of the legislature of 1895 *and the conveyance from the bridge company to it. Its rights to the bridge and the approaches thereto were acquired not in its sovereign capacity, but as the successor in interest to and claimant under the bridge company.* Whatever agreement the bridge company may have made affecting the property conveyed to the

city were imposed upon such property while in the hands of its grantees to the same extent that they were imposed upon the property while in the hands of the bridge company. The city stood in respect to this property precisely as any private individual would stand as a grantee from any private individual.

When the bridge was purchased this opening in the approach had been in use for many years, and lower wharves had been in use by plaintiffs and their predecessors. This user was not secret, but was notorious in its character. The opening was visible, and was in constant use. When the city made its purchase, finding this roadway in use, it was put upon notice as to the claims of the plaintiffs. It therefore became charged with notice of this agreement on the part of the bridge company, and made its purchase subject thereto. This proposition, it seems to us, is too plain to require authority.

(2) The long acquiescence and user by plaintiffs, if the city were otherwise entitled to attack these ordinances, should now preclude it from so doing. The ordinances were passed with the intent that the privileges conferred should be exercised. The wharves were built and the expenditures made in reliance upon these ordinances. Their passage was not contrary to any statutory provision, nor were the contemplated uses of the portions of Morrison street in any way extraordinary or illegitimate. Plaintiffs have been exercising the rights claimed by them for a period long exceeding the period of limitations, which, in Oregon, is ten years. When that period had expired it was the law of this state that the limitations prescribed in the Code should apply to actions and proceedings brought in the name of the state or any county or other public corporation or for its benefit in the same manner as to individuals. These pro-

visions applied also to suits in equity. If, as a proposition, the city is bound by the same limitations as private parties, there is no sound reason why it should not equally be bound by the doctrine of equitable estoppel.

In U. S. v. W. V. & C. M. W. R. Co., 54 Fed. Rep. 811, Judge Gilbert says:

"There is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped."

See also, In re Parker, 11 Fed. Rep. 397.

Commonwealth v. Andre, 3 Pick. 225.

Vidal v. Girard's Exrs., 2 Howard (U. S.), 191.

Enfield v. Permit, 5 N. H. 285.

Pengra v. Munz, 29 Fed. Rep. 830.

People of Vermont v. Society for Prop. etc., 2 Paine, U. S. (C. C.) 546, 560.

Cahn v. Barnes, 5 Fed. Rep. 326, 334.

Commonwealth v. Pejepscut, Proprietors, 10 Mass. 155.

People v. Maynard, 15 Mich. 470.

Menard v. Massey, 8 Howard (U. S.) 313, 314.

State v. Bailey, 19 Ind. 454.

Governor, opinion of Court in response to, 49 Mo. 225.

In Hitchcock v. Galveston, 96 U. S. 351, it is said:

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other

law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires; and, in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In C. N. W. R. Co. v. Elgin, 91 Ill. 251, it appears that the authorities of the city acquiesced for nineteen years in the use of a public street by the railroad company in maintaining an arch over the street, and thereafter made an agreement in writing with the railroad company whereby the right to use the street was continued until it should be necessary to rebuild the arch. The city was held estopped from compelling the removal of the arch until it should become necessary to rebuild the same.

The court, on page 254, observes:

"But, while the railroad company can not in this case defeat a recovery on the ground the statute of limitations has run, yet there is a defense of a kindred nature, which is a complete bar to a recovery The long acts of recognition by the City of Elgin, of the right claimed by the railroad company to the use of the street as a part of its right of way, the acquiescence in the exercise of the right in connection with the contract which the city made with the railroad company in 1870, must be regarded as estoppel in pais

against the city. What contract was made between the City of Elgin and the railroad company, at the time the road was built through the city in 1851, in regard to the use of the street for the right of way, does not appear in evidence. Doubtless some arrangement was made which was satisfactory to the parties. If this had not been the case, it is unreasonable to believe the railroad company would have been permitted to occupy the streets so long without a murmur or a word of objection from the city. That the city had the power to allow the streets to be used by the railroad company, is not denied, nor is it an open question that a street or highway may be legitimately used by a railroad company in the construction of a railroad."

In the case at bar, as will be seen, it was the consent of the city which caused the property-owners to build these wharves, and since that time, for a period of more than twenty years, the city has acquiesced in such occupation of its streets by plaintiffs and their predecessors in interest, and has continued to recognize such right of occupation.

II.

THE BRIDGE ACT WAS NOT A LEGISLATIVE CHANGE OF GRADE.

It has been decided in Oregon that an abutting proprietor has no right to compensation for damage incidental to the change of grade of a city street.

Brand v. Multnomah County, 38 Ore. 79.

On this, it is claimed by the defendants that the act of October 18, 1878, providing for building the bridge across the Willamette river, is in effect a legislative change of the grade of Morrison street for its full width, and that under the doctrine of the Brand case, *supra*, the legislature has supreme power to change the grade of a city street.

We shall not here contend that an abutting proprietor has the right to relief against a valid change of grade of the street on which his property fronts, nor that the legislature had not power to change the grade of Morrison street by a proper enactment, but we claim (a) that the bridge act of October 18, 1878, under which the authority to close the opening in Morrison street is claimed, was not intended to, and did not, change the grade of that street; and (b) moreover, that if it did change the grade at all, it changed it as to those portions of the street only that were actually made use of on the new grade as an approach to the bridge, the remainder not being affected by the act. And as an incident to this latter point, we will argue (c) that the power given to the bridge company to build an approach to the bridge on Morrison street, to conform to the grade on Front street, was exhausted with the exercise of the right, and that the defendants have no power under the act, after a lapse of nearly twenty years, to extend the approach of the bridge to cover the opening in Morri-

son street and change the grade where it was not changed when the bridge was built.

THE BRIDGE ACT WAS NOT INTENDED TO CHANGE THE GRADE OF MORRISON STREET.

If it be true that the legislature had power to change the grade of Morrison street to the injury of abutting owners, it must be admitted that an act that will have such consequences must be clear and unequivocal. No presumption is to be indulged in that the legislature disregarded property rights or intended to destroy the value of improvements erected in good faith conforming to the previous grade of the street.

The Portland charter, in force at the time the bridge act was adopted, vested the city with the custody and control of the streets and with power to establish and alter their grades.

"Section 78. The council has power and is authorized, whenever it deems it expedient, to establish or alter the grade, and to improve any street or part thereof, now or hereafter, laid out or established within the corporate limits of the city. The power and authority to improve a street includes the power and authority to improve the sidewalks or pavements, and to determine and provide for everything convenient and necessary concerning such improvement.

"Section 79. No grade or improvement mentioned in Section 78 can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper in the City of Portland."

Laws of Oregon, 1864, p. 18.

These provisions indicates that the law-making power deemed the subject of importance to the abutting owners and exercised care to safeguard their interests. The charter provided for ten days' notice by

publication of the proposed establishment or change in grade, and if the owners of two-thirds of the adjacent property remonstrated, the proposed establishment or alteration was defeated. These or kindred provisions are to be found in the subsequent charters of the city. While these charter provisions do not, of course, control or curtail in any way the power of the legislature, their existence, and the power vested in the abutting owner to defeat a proposed establishment or change of grade, afford a strong argument that the act of October 18, 1878, should not be regarded as a legislative change of grade unless such conclusion is express or is necessary for the purpose of the act. This is particularly true if we consider that any such construction of the act would result disastrously to the abutting owners who made their improvements on the faith of the ordinances, and built their wharves before the construction of the bridge was commenced.

Now, the bridge act does not in terms purport to change the grade of Morrison street. It does not even require the bridge to be located on that street. It simply provides that the bridge may be erected "at such point or location on the banks of said river, *on and along any of the streets of either of said cities of Portland and East Portland, as may be selected or determined on by said corporation, or its assigns, on or above Morrison street of said City of Portland and any street of City of East Portland.*" The bridge was to be erected *at any time within six years* from the passage of the act, and upon the filing of the acceptance of the terms of the act by the bridge company and the entrance upon construction of the bridge in good faith, the act should *"be deemed a vested granted franchise."*

See the Act (Abstract, p. 14.)

Furthermore, as already shown, the act was a grant to a private corporation, the Portland Bridge Company, to build a toll bridge, and not an act to provide for building a public bridge by the city or the county.

The primary purpose in passing the act was to provide for a bridge across the river. The title of the act authorizes the construction of a bridge "on the Willamette river." The body of the act calls for a bridge "across the Willamette river between Portland and East Portland." The construction of the bridge was the object the legislature had in view.

For the attainment of this object, it was not and *is not necessary* to hold that the act was to operate as a legislative establishment or change of the grade of Morrison street. The bridge could have been built without placing any such construction upon the act. *The provision that the approach on the Portland side should conform to the grade of Front street may well be regarded as a limitation upon the power of the bridge company.* If it were *necessary* to establish the grade of the approaches on the Portland side, it was equally *necessary* to regulate the approach on the East Portland side. Yet this the legislature did not do. And if it had been the intent to establish the grade of the streets occupied by the approaches, we submit that the legislature would have expressed its meaning in unequivocal terms.

IF THE BRIDGE ACT AND THE BUILDING OF THE BRIDGE OF MORRISON STREET DID OPERATE AS A CHANGE OF THE GRADE OF THAT STREET, IT SO OPERATED ONLY AS TO THAT PART OF THE STREET THAT WAS ACTUALLY MADE USE OF FOR THE APPROACH TO THE BRIDGE.

The act of 1878 does not provide how wide the bridge shall be, nor how much of the street shall be occupied by the approach. It merely provides that the approaches on the Portland side shall conform to the present grade of Front street. In building these approaches, the bridge company left the opening which permitted the use of the roadway leading to the lower wharves. This condition existed for upward of fifteen years before the suit was begun, during all of which time plaintiffs and their predecessors have maintained such roadway and wharves, and during which time the original grade of Morrison street through the opening has remained unaffected. This open space is eighteen feet wide and ninety-five feet long, and in this space, as well as beyond it and under the bridge approach, the former grade of the street has remained unaltered.

We claim that when the bridge approach was built if it did alter the grade of Morrison street at all, it did not do so except where the approach was built. The bridge company made its election. It declared, in effect, that it did not require or desire any more of the street than it occupied.

More than fifteen years have elapsed since the approach to the bridge was built by the private bridge company. It seems self-evident that the bridge company, if still in possession of the bridge, could not now, without further legislative authority, proceed to change the grade of the remainder of the street. And, as we have already argued, the city, which is the suc-

cessor in ownership of the bridge, seems to be in no better position. If it has the right to change this grade, it is either (1) because it holds that right by assignment from the bridge company, which is absurd if the bridge company had exhausted its right and was bound by its election; or (2) by virtue of the authority granted to it as a municipal corporation to alter and change the grade of streets; and if it is there that the city rests its claim, it is well answered by pointing out that it is not attempting to exercise the power by ordinance, after notice and a hearing, as provided by the terms of the charter of the City of Portland.

See the charter, Laws of Oregon, (1898) pp. 150, 165.

The ordinances adopted in 1878 and 1879, authorizing the building of the wharves, were adopted, and the wharves were built and in use several years *prior to the beginning of work upon the bridge.* In the meantime the bridge company, under the terms of the statute, had a general right to select any one of many streets for the bridge approach. Whatever may be said of this act of October, 1878, it is clear, therefore, that until the particular street to be occupied by the bridge had been selected by the bridge company, the act was a "float." Until the work of construction of the bridge had been actually commenced (which step, by the terms of the act, might have been taken any time within *six years*), the grant was not to be deemed a *"vested, granted franchise."* Until *commencement of the work, no rights of any nature attached. Before any rights vested, certain conditions precedent had to be complied with.* It was well within the range of possibility that no rights at all would ever be acquired under the act. *The act was in effect merely an offer, which might or might not be accepted.*

Before the act of 1878 went into effect, the city

had undertaken to establish the grade of certain portions of Morrison street. We allude to these wharf ordinances which had this effect. The ordinances show that the city intended thereby not merely to provide additional wharves for the commerce of the city, and to furnish a means of access thereto, but also contemplated that the lower wharves on Morrison street should be used by the public. These ordinances affected the public interests as well as did the legislative act of 1878, and are equally entitled to be regarded as legislation for the public benefit; and unless such construction is unavoidable, the act of 1878 should not be so construed as to give it the effect of annulling other previous legislation of a kindred character and destroying the value of investments made in reliance thereon.

In its character as a "float," the act is entitled to no more favorable consideration than is a Congressional grant of lands to a railroad company, to which it is akin. Indeed, it would not seem to be as favorable to the beneficiary. A railroad grant is a grant *in praesenti*. But this term can not possibly be applied to the act of 1878. The authority it conferred was not to be a *"vested, granted franchise"* until the conditions precedent had been fulfilled. Even in these railroad grants no right or title is conveyed as to any particular lands until they have been identified by the definite location of the road. All lands, which at the date of such location may have been otherwise taken or disposed of, are excluded from the grant.

In Van Wycke v. Knevals, 106 U. S. 360, it is said of such a railroad grant:

"But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely

fixed,' and can not be the subject of future change, except upon legislative consent."

Why should not the same principle be applied to the act of 1878? We know of no reason why an act of a state legislature should receive a different or more liberal interpretation than akindred act passed by Congress. *We invoke the application of this principle to the case at bar, and contend that when the bridge company constructed its approaches in the manner in which they were constructed, it definitely announced that it had selected all of the street requisite or desired by it for the purpose of the bridge; and that thereby the approaches were definitely fixed and could not be made the subject of further change. The rights of the bridge company, under the act, as to other portions of the street (if it ever had any) were exhausted.*

Other cases holding that the exercise of the power of locating a railroad, a turnpike, a canal, or a bridge, is exhausted when the location is made, are the following:

Allen v. Board of Freeholders, 13 N. J. Eq. 68.
Moorehead v. Little Miami R. R. Co., 17 Ohio, 340.
Griffen v. House, 18 Johns. (N. Y.) 397.
Cayuga Bridge Co. v. Mager, 6 Wend. (N. Y.) 85.
State v. Norwalk Turnpike Co., 10 Conn. 157.
Blackemoore v. Glamorganshire Canal, 1 Mylne & K. 154.

There is nothing new or radical in this contention. It is merely a statement of a familiar rule of the law of easements.

In Jennison v. Walker, 11 Gray (Mass.), 426, it is observed:

"Where an easement in land is granted in general

terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised can not be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and definite course, with full acquiescence and consent of both parties, it can not be changed at the pleasure of the grantee. If it be admitted that he has the right originally to select the place in which the easement is to be enjoyed, he can not afterward alter it. Convenience and justice both require this limitation on the right; otherwise, it would be to open questions of great doubt and difficulty, and would make the servient estate in great measure subject to the unrestrained control of the owner of the easement. *It has therefore been held that the course of a way, when once established, can not be altered by either party without the consent of the other.* Com. Dig. Chimin. d. 5. Jones v. Percival, 5 Pick. 485. Wynkoop v. Burger, 12 John. 222. This rule rests on the principle that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties."

Bannon v. Angier, 2 Allen (Mass.) 128.

Ev. L. St. J. O. H. v. Buf. Hydraulic Assn., 64 N. Y. 564.

Onthank v. L. S. & M. S. R. R. Co., 71 N. Y. 194.

Warner v. R. R. Co., 39 Ohio St. 72.

In this connection we direct the particular attention of the court to the case of Rush v. Jackson, 24 *Cal.* 317, *involving a legislative grant of a right to*

build a wharf 1200 *feet long. It was held that the building of a wharf only* 200 *feet long exhausted the grant.* The court says, pp. 316 and 317:

"On the first day of July, 1852, within a reasonable time after the passage of the act, the grantees selected a site for a wharf, and built one not exceeding two hundred feet in length, and from that time to the present no further appropriation has been made, nor is there even an averment in the complaint that they now desire or intend to extend their wharf, or that the same is demanded by the wants of commerce. *In this manner they signified their acceptance of the grant and the extent of that acceptance. Thereby they determined, as they had the right to do within the limitations imposed by the act, the site and length of the wharf. By these acts all the conditions of the grant which were left for them to determine became fixed, and the act was made operative as a grant to the extent of their appropriation, and no further.* By the erection of the wharf the land covered by it and within one hundred feet on each side became segregated from the other land of the state, and to it the grant attached, and passed the estate therein specified. All the land outside the boundaries thus established remained the property of the state as absolutely as before the passage of the act."

While the benefits to accrue ultimately to the public may have occasioned the passage of the act of 1878, its immediate beneficiary was, of course, the bridge company. *That corporation had sole discretion as to the extent to which it would exercise the privileges conferred. Its own determination was conclusive as to how wide it should build the bridge. If it desired only twenty-five feet of the street for the approach, there was no power either in the legislature or in the city, or in anyone else, to require it to occupy more.*

When it built the bridge as it now stands—when it occupied the street with its approaches, leaving the opening in controversy therein—it conclusively announced, within the rules of law to which we have referred, that it had exercised the privileges conferred by the act, so far as it desired to do so; and no better argument can be found in support of this view than the fact that these conditions have remained unchanged for fifteen years.

The case of Willis v. Winona City, 59 Minn. 27 (60 N. W. Rep. 814) illustrates the point now under discussion. The defendant city, by virtue of legislative authority, had constructed a bridge across the Mississippi river, and an approach was built to this bridge in the center of Main street, commencing a short distance south of plaintiff's lot and gradually rising until it reached the height of about 25 feet opposite the north end of the lot. This approach was 24 feet wide, *and left a portion of the street, on each side, at the former grade.* The approach was covered with plank and supported by abutments and columns of iron and stone. It would hardly be argued that if these conditions had existed for twenty years, at the end of that period the elevated approach could have been rebuilt in such a manner as to occupy the entire width of the street, without further legislative action; or that the right to construct this approach could be regarded as authorizing the future occupation of any more of the street than it originally occupied. The opinion of the court clearly indicates that the grade of the street was changed only as to so much of it as was actually occupied by the approach. On page 815 it is said:

"The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. *This it*

has done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the street solidly or, as in this case, by supporting the way on stone or iron columns. *Neither is it important that the city raised the grade of only a part of the street, leaving the remainder at a lower grade."*

CONCLUSION.

In conclusion, we will say that while we recognize the weight that should be given to the opinion of the learned Supreme Court of the State of Oregon, and realize that the burden is upon the plaintiffs in error to show that the result of the decision rendered is to deny the rights guaranteed by the amendments to the constitution of the United States, we think it plain that a mistake has been made in assuming that the grade of the city street was changed by the bridge act, and that the plaintiffs have no proprietary and private interests in the wharves, and that their injury is common to the public generally. The assumption that the wharves at the foot of Morrison street are purely public wharves, and that the plaintiffs' right to build and maintain them does not owe its origin to the reservation in the town-site dedication, but is a mere revocable permission given by ordinance, without consideration, is entirely unwarranted under the complaint. The court, in following the precedent set by a previous decision in the Brand case, 38 Ore. 79, failed to distinguish the important and essential allegations of the complaint here in reference to the reserved wharfage rights in the Lownsdale claim and the building of wharves at the foot of the street, neither of which features were found in the Brand case. But if the Brand case can be deemed a parallel,

then we claim it is wrong in principle and in application in denying vested property rights the protection afforded by the supreme law of the land.

Respectfully submitted.

CHARLES H. CAREY,
C. E. S. WOOD,
S. B. LINTHICUM and
J. C. FLANDERS,
Attorneys for Plaintiffs in Error.

CAREY & MAYS,
Of Counsel.

FILE COPY.

No. 56

IN THE

Supreme Court

OF THE

United States

Supreme Court U. S.
FILED
NOV 27 1905
JAMES H. McKENNEY,
Clerk.

October Term 1905

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, and STELLA BAHAM MEAD, Trustees, etc., et al
Plaintiffs in Error

vs.

THE CITY OF PORTLAND, et al
Defendants in Error
In Error to the Supreme Court of the State of Oregon

Brief of Defendants in Error

L. A. McNARY, City Attorney
J. P. KAVANAUGH,
Attorneys for Defendants in Error

SCHWAB BROS. P. & L. CO., PORTLAND.

IN THE

Supreme Court

OF THE

United States

October Term 1905

JOSHUA ROBERTS MEAD, ANNA LEOCADIE LEE, WILLIAM WESLEY MEAD, and STELLA BAHAM MEAD, Trustees, etc., et al
Plaintiffs in Error

vs.

THE CITY OF PORTLAND, et al
Defendants in Error
In Error to the Supreme Court of the State of Oregon

Brief of Defendants in Error

STATEMENT OF THE CASE.

The plaintiffs in error brought suit in the Circuit Court of the State of Oregon for the County of Multnomah to restrain the City of Portland, its officers, agents and employes, from closing an opening in approach to Morrison Street bridge in said city. A general demurrer to the complaint was sustained by the Circuit Court and an amended complaint was filed. A general demurrer was interposed to the

amended complaint and the Circuit Court sustained that demurrer, and plaintiffs in error refusing to plead further, a decree was entered dismissing the amended complaint (Abstract, p. 27 et seq.). Upon appeal the Supreme Court of the State of Oregon affirmed the decree of the Circuit Court in all things. (Abstract, p. 38 et seq.). The cause is brought here by plaintiffs on a writ of error to the Supreme Court of the State of Oregon, upon the ground that certain constitutional questions are involved.

THE AMENDED COMPLAINT.

It is alleged in the amended complaint that the plaintiffs are the owners of block 76 and the south half of block 77 in the City of Portland. Both of these parcels of land are bounded on the west by Front Street and on the east by the Willamette River; the north line of Morrison Street is the south boundary line of the south half of block 77, and the south line of Morrison Street is the north boundary line of block 76.

That the property described is located within the Donation Land Claim of Daniel H. Lownsdale, and that in the dedication by said Lownsdale of the plat of the Town of Portland, recorded December 16, 1852, it is provided as follows.

"The wharves and wharfing privileges are specially reserved to the owners of the claim, and never (except by deed) subject to any but the laws of the Territory of Oregon, or ordinances of the town or

city corporation, as other town (private) property."

That on September 26, 1878, the City of Portland adopted Ordinance No. 2273, entitled "An Ordinance authorizing the construction of a wharf in the Willamette River, in front of and opposite lots numbered 3 and 4 in block No. 77." Said ordinance is as follows:

"The City of Portland does ordain as follows:"

"Section 1. The owner or owners of lots 3 and 4 in block 77, in the City of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette River on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front Street from a point 100 feet north of the north line of Morrison Street, the lower floor of said wharf to be as near ten feet above the base of grades as practicable; provided that the owner or owners of said above described property shall construct and maintain at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison Street and to be in accordance with the plans on file in the office of the auditor and clerk."

"Section 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passage way, 15 feet in width, along and over the north side of Morrison

Street to within 28 feet of the easterly margin of said wharf and for said distance of 28 feet said passage way shall not extend southwardly into the street for a greater distance than six feet; provided that the whole of said passage way and all of those portions of said wharf extending over and into the street shall be subject to regulation by the common council as part of said street and sidewalk; and, provided, further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf."

"Section 3. The owners of the property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed with wood, with the roof covered with tin, anything contained in Ordinance No. 1140, entitled 'An Ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments thereto to the contrary notwithstanding."

That on February 21, 1879, the City of Portland adopted Ordinance No. 2387, entitled "An Ordinance authorizing the construction of a wharf in the Willamette River in front of and opposite lots Nos. 3 and 4 in block 76."

By the terms of said ordinance the owners of lots 3 and 4 in block 76 were authorized and permitted to construct a wharf of piles and timber in the Willamette River on and in front of said lots. The location of this wharf is designated in the ordinance (Ab-

stract, p. 12). The lower floor of the wharf is required to conform to the grade of wharf provided by Ordinance No. 2273, at its connection therewith, and it contains the same provision concerning the pontoon at the foot of Morrison Street. The other provisions of the ordinance are identical with the provisions of Ordinance No. 2273, except that the wharf was to be constructed south of Morrison Street, instead of north.

It is alleged that under and in pursuance of said ordinance the respective predecessors in interest of plaintiffs constructed wharves in conformity with the provisions of said ordinances and the grades therein established, "**the said wharf constructed pursuant to said Ordinance No. 2387, covering the south half of said Morrison Street, being constructed over and on the south half of said Morrison Street, and on the east end of said block 76, as provided in said ordinance, and the wharf constructed pursuant to said Ordinance No. 2273, extending over and covering the north half of said Morrison Street, and on the east end of said south half of said block 77.**"

That said wharves so constructed on the east end of said blocks consist of two floors or stories, and upon the second story of each of said wharves the respective owners of said property constructed large warehouses, and the portions of said wharves on and over Morrison Street are on a level with said lower wharves on the east sides of said blocks 76 and 77.

That the lower floors of said wharves are considerably below the grade of Front Street, and were connected with Front Street by a roadway running on an incline along Morrison Street from Front Street down to the portion of said wharves so built on said Morrison Street, which roadway was constructed by the owners of the property aforesaid.

That said docks, wharves and warehouses and the approaches thereto have been constructed, maintained and used by plaintiffs and their predecessors in interest for more than 20 years, and that **"said docks and wharves, upon and over said Morrison Street and said approach thereto from Front Street so constructed and maintained by plaintiffs and their predecessors in interest, have been used as a street or highway by the public."**

That by an act of the Legislative Assembly of the State of Oregon, approved October 18, 1878, the Portland Bridge Company, a corporation, and its assigns, were authorized to construct a bridge across the Willamette River, between the City of Portland and the City of East Portland, on and along any of the streets of said cities which might be selected by said corporation on or above Morrison Street in the City of Portland and on a street in the City of East Portland. And it was therein provided that the approach on the Portland side of said bridge should conform to the grade of Front Street in the City of Portland. And said act further provided that on the filing of the accept-

ance of the terms of said authority by said corporation, and the entrance upon the construction of said bridge in good faith by said corporation, or its assigns, the said act should be deemed a vested granted franchise (Abstract, p. 15).

That about the year 1886, said corporation, or its assigns, in accordance with the terms of said act, constructed a bridge across the Willamette River, the west end of which was located at the foot of Morrison Street in the City of Portland. The builders also constructed a plank road or approach extending over Morrison Street from Front Street to the Willamette River. This plank way covered the whole of Morrison Street from Front Street to the river, except an open roadway, which roadway was about 18 feet in width and about 95 feet in length, from Front Street toward the river, and afforded a means of access to the public wharf and the lower floors of the private wharves above described.

That by an act of the Legislative Assembly filed February 21, 1895, (Abstract, p. 17) and a deed of conveyance dated July 3, 1895 (Abstract, p. 20), the said Morrison Street bridge was conveyed to the City of Portland.

That at the time of said purchase the portions of Morrison Street, so occupied by said docks and wharves and said roadway or incline, leading from Front Street thereto, were being and have been maintained and kept up by plaintiffs, and their predecessors in interest and were and have been used by them

and the public upon their original grade and without any change in such grade as a means of access to said lower docks and wharves and as a public highway.

It is alleged that about the year 1886, the Willamette Iron Bridge Company, an assignee of the Portland Bridge Company, began the construction of said bridge, and while the same was in the course of construction, the constructing company built two large piers in the Willamette River to support the west end of such structure, within a few feet of and in front of the center line of said public wharf constructed upon Morrison Street, and in such position as to obstruct the navigation of the river at that place, and so as to greatly interfere with the access to said private wharves by boats and vessels, and the use of said wharves was thereby rendered inconvenient and difficult; and at the same time said company began to construct the approach to said bridge over Morrison Street and threatened to construct the same so as to greatly interfere with the access to said wharves, to the great damage of the owners thereof. That thereupon the owners of said wharves on or about the 6th day of April, 1887, protested against said acts of the said company and claimed that said structures were and would continue to be public nuisances and illegal, and that said owners had a right to have the same abated and removed, and had a right to sue for and recover damages for the injuries sustained thereby. That while said controversy was pending and undetermined, and

in consideration of the agreement of the wharf owners to waive their right to institute suits and proceedings to protect their rights and to abate the alleged nuisance and enjoin the construction of said structures, a compromise was effected, whereby the said Willamette Iron Bridge Company agreed on its part forever to leave the opening in the approach as it now exists, and the wharf owners agreed to permit said piers to remain as then constructed, and as they have since remained.

That about the year 1890, the said Willamette Iron Bridge Company, in disregard of its said agreement, wrongfully and unlawfully threatened to close the said openings in Morrison Street and thus shut off the means of access to the docks and landings, and certain of these plaintiffs, and others, began a suit in equity in the Circuit Court of the State of Oregon, for the County of Multnomah, to restrain the said company from closing the said opening; and in consideration of the dismissal of said suit without costs to defendants, or further proceedings after filing the complaint, the said Willamette Iron Bridge Company entered into an agreement whereby it agreed to desist from said threatened acts and to leave the said opening and approach in the same condition they were then in and have since remained.

That the City of Portland is the successor in interest of the Willamette Iron Bridge Company, and that it acquired no greater rights in said approach under said legislative acts and deed of conveyance

than its predecessors in interest had or could claim, and that it is estopped to close said opening.

That the legislative acts of 1891 and 1895, and the conveyance of the Willamette Iron Bridge Company to the City of Portland, were subject to said agreement and the rights vested in the plaintiffs in said suit and their successors in interest.

That defendants threaten to and are proceeding, without tendering or offering plaintiffs any compensation therefor, to close said opening in Morrison Street, which is the only means of ingress and egress which plaintiffs and the public have to said wharf on Morrison Street and the said lower wharves in front of plaintiffs' property, erected under said ordinances, and will deprive plaintiffs and the public wholly of the means of access to said lower wharves in front of plaintiffs' property, and upon Morrison Street, and will destroy the use of said roadway and said wharf on Morrison Street as a highway, as the same have heretofore been used.

And the amended complaint contains the following additional averments:

"Plaintiffs further state that said wharf and wharfing privileges, with the right of access to and egress from the same by Morrison Street, are property and property rights which they own, and that the same, and the rights and privileges granted under and by virtue of said ordinances are vested rights and of great value, and that to close up said

opening in Morrison Street and so deprive them of the use and enjoyment of said wharf and wharfing privileges and render the same nearly or quite valueless would be to deprive plaintiffs of their property without the due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and plaintiffs claim said wharf and wharfing privileges and their use and enjoyment with a right of ingress to and egress from the same as heretofore described, under the provisions of said amendment."

"Plaintiffs further allege that the hereinbefore recited ordinances of the City of Portland, accepted and acted upon as aforesaid by plaintiffs' predecessors in ownership of said property, constitute a contract between the City of Portland, having full power at the time to make the same, and plaintiffs' predecessors; and the acts of the Legislative Assembly of the State of Oregon, hereinbefore recited, so far as they confer or undertake to confer upon said defendants any power to deprive plaintiffs of the use of their wharves and wharfing privileges, in manner as aforesaid, impair the obligation of said contract and violate section 10 of Article I. of the Constitution of the United States, under which plaintiffs hereby claim protection from the proposed action by defendants as hereinbefore described."

POINTS AND AUTHORITIES.

I.

1. The question to be determined by this Court

in this case is the validity of the statute that is alleged to impair the contract, and not whether it was properly construed by the State Court.

Central Land Company v. Laidley, 159 U. S., 103.

Commercial Bank v. Buckingham, 5 Howard, 317.

The real question presented by plaintiffs is whether the statute was properly construed, and not whether the statute itself is valid.

2. The ordinances of the City of Portland authorizing the construction of the wharves do not constitute a contract between the said city and plaintiffs' predecessors in interest.

Secs. 4042 and 4043, Bellinger & Cotton's Code of Oregon.

Wabash R. R. Co. v. Defiance, 167 U. S., 88.

3. The lower floors of the private wharves extend over and upon Morrison Street, but it is not alleged that they extend beyond the eastern terminus of Morrison Street into the Willamette River.

4. The disclaimer by plaintiffs of any proprietory interest or private ownership in the wharves on Morrison Street is fatal to their claim to relief by injunction.

Transportation Company v. Chicago, 99 U. S., 635.

Hoboken L. & I. Co. vs. Mayor, 36 N. J. L., 540.

Thoyar vs. New Bedford R. R. Co. 125 Mass., 257.

II.

1. The closing of the driveway through the approach on Morrison Street is not a taking of plaintiffs' property without due process of law. The closing is merely the result of the establishment of the street grade, and that does not constitute a taking of property within the meaning of the constitution.

2. Dillon Minn. Corp. (4th Ed.) Sec. 686.

Transportation Co. v. Chicago, 99 U. S., 635.

Selden v. Jacksonville, 28 Fla., 558.

Willets Mfg. Co. v. Board, 62 N. G. L., 95.

2. The closing of the driveway is not a confiscation of plaintiffs' property because the amended complaint shows that plaintiffs have other means of access to both the upper and lower wharves.

Mere inconvenience in the access to property is not a sufficient reason to prevent the city from closing the driveway.

Burns v. Gallagher, 62 Md. 462.

Mitchell v. Seipel, 53 Md. 251.

3. The wharves were not constructed under an irrevocable license. No exclusive right to or interest in the wharves was granted to or claimed by the owners of the private wharves, and in such case the license is revocable at the pleasure of the licensor.

Parish v. Kaspare, 109 Ind., 586.

St. Louis Stock Yards v. Wiggins Ferry Co. 112 Ill., 384.

Rayner v. Nugent, 60 Md., 515.

4. The agreement of the bridge company to leave the driveway open does not bind the city, because when the approach was built it became a public highway under the control of the city and the company had no authority to keep a part of the street surface open.

Pittsburg, etc. Ry. v. Point Bridge Co. 165 Pa. St., 37 (26 L. R. A., 323).

This alleged agreement was not of record, and it does not appear that the city had any notice of it, so that the city, being an innocent purchaser in good faith and for value, took the property free from any such arrangement.

ARGUMENT.

No Federal Questions Involved.

There are but two questions presented to this Court for decision. These questions are: (1) Whether ordinances numbered 2273 and 2387 of the City of Portland, authorizing and permitting the construction of wharves upon and in front of blocks 76 and 77, constitute a contract between the City of Portland and plaintiffs' predecessors in interest, the obligation of which is impaired by the act of the Legislative Assembly of the State of Oregon, author-

izing the construction of the Morrison Street bridge; and (2) whether the closing of the opening in the western approach of said bridge deprives plaintiffs of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

I.

1. Does This Court Acquire Jurisdiction to Determine Whether the Obligation of a Contract Has Been Impaired in This Case?

Before this Court can assume jurisdiction by writ of error to a State Court on account of the alleged impairment of the obligation of a contract, it must appear that the obligation of the contract was impaired by a statute of a state which has been upheld and enforced by the State Court. We assume that the question to be determined by this Court is the validity of the impairing statute, and not whether it was properly construed by the State Court.

In Central Land Company v. Laidley, 159 U. S., 103, 109, this Court said: "The appellate jurisdiction of this Court upon writ of error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the Legislature alleged to be repugnant to the Constitution of the United States has been decided by the State Court to be valid, and not when an act admitted to be valid has been misconstrued by the Court."

In Commercial Bank v. Buckingham, 5 Howard, 317, 343, Mr. Justice Grier, in delivering the opinion of the Court, said: "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligations of contract. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by the judiciary."

The amended complaint attempts to raise the question in the following averment:

"Plaintiffs further allege that the hereinbefore recited ordinances of the City of Portland, accepted and acted upon as aforesaid by plaintiffs' predecessors in the ownership of said property, constitute a contract between the City of Portland, having full power at the time to make the same, and plaintiffs' predecessors; and the acts of the Legislative Assembly of the State of Oregon, hereinbefore recited, so far as they confer or undertake to confer upon said defendants any power to deprive plaintiffs of the use of their wharves and wharfing privileges in the manner aforesaid impair the obligation of said contract and violate Section 10 of Article 1 of the Constitution of the United States, under which plaintiffs hereby claim protection from the proposed action by said defendants as hereinbefore described."

This averment of the amended complaint is the only assault upon the validity of the acts of the Legislative Assembly. And they are only assailed in "so far as they confer or undertake to confer upon said defendants any power to deprive plaintiffs of their wharves or wharfing privileges." It is not charged that these legislative acts confer or undertake to confer any such power, nor does the language of the acts aid the averment, because they are silent upon the point. We submit, therefore, that the amended complaint contains no proper averment of fact to present the question to this Court. Nor does plaintiffs' voluminous brief, in any way illumine their pleadings. On the contrary, the arguments are addressed, not to the validity of the legislative act, but to its proper and reasonable construction. The relief sought in this case is not the annullment of an unconstitutional statute, but the reversal of the decision of the State Court on the ground that the construction put upon the statute is erroneous. Plaintiffs' arguments are directed exclusively to that end. They contend: (1) That the bridge act does not constitute a legislative change of grade. Upon this point, it is argued: "That the bridge act of October 18, 1878, under which the authority to close the opening in Morrison Street is claimed, was not intended to, and did not change the grade of that street." (2) "That if it did change the grade at all, it changed it as to those portions of the street only that were actually made use of on the new grade as an approach to the bridge, the remainder not being affected by the act"; and, (3)

"That the power given to the Bridge Company to build an approach to the bridge on Morrison Street, to conform to the grade on Front Street, was exhausted with the exercise of the right, and that the defendants have no power under the act, after a lapse of nearly twenty years, to extend the approach of the bridge to cover the opening in Morrison Street and change the grade where it was not changed when the bridge was built." (Plaintiffs' Brief, p. 55.)

The extended arguments which are devoted to these respective subjects can have but one object; and that is to reverse the decision of the Supreme Court of Oregon on account of the alleged improper and unwarranted construction placed upon the Oregon statute. The plaintiffs nowhere contend that the Legislative act is invalid, or that it would, if properly construed, impair the obligation of the alleged contract. We find from plaintiffs' arguments that they have utterly abandoned the position taken in the amended complaint, and instead of asking the Court to declare the statute unconstitutional, now declare that the statute did not effect a change of grade; or if the grade were changed, that the opening and driveway were not affected thereby. We cannot persuade ourselves that this Court would entertain jurisdiction for any such purpose. It is clear from plaintiffs present attitude that the averment of the amended complaint is merely colorable and perfunctory, and was not intended to be seriously urged. From these considerations it follows that this Court

ought to dismiss without further notice that part of the amended complaint which relates to the impairment of the obligation of a contract.

2. Ordinances Numbered 2273 and 2387 do not constitute a contract between the City of Portland and Plaintiffs' predecessors in interest.

The averment of the amended complaint states broadly that the ordinances constitute a contract. While the character or extent of the obligation of the contract is not defined, it could be no other than the right of access to the lower floor of the wharves by way of Morrison Street. The ordinances merely authorize and permit the plaintiffs' predecessors in interest to construct wharves in front of their private property, and the language might be construed to give permission to the grantees to extend the lower floors of their respective wharves over and upon Morrison street. The purpose of these ordinances was perfectly clear. At the time of their adoption there was a general statute in force which permitted riparian owners within the limits of incorporated towns and cities to construct wharves in front of their property on navigable streams, subject to the right of the town or city to regulate the manner of construction.

> Secs. 4042 and 4043, Bellinger & Cotton's Code of Oregon.

These ordinances were an exercise of such right of regulation. Under its right of regulation the city

had authority to require the wharves to be constructed in the way that would best serve the interests of navigation. For this purpose the private wharves were constructed with two decks or floors to meet the exigencies of high and low water. For the public convenience elevated passage-ways were constructed from Front street to the upper decks of the wharves, and an incline roadway leading to the lower floors. To insure the public safety, fire traps were maintained in the lower roadway. Each of the owners was required to maintain pontoons at the foot of Morrison Street, suitable for the landing of small boats. The lower floors were to be built as near ten feet above the base of grades as practicable. In these particulars the city was merely exercising its right of regulation. The language is permissive. The owners are "authorized and permitted" to build the wharves. If the right to extend the lower floors on and over Morrison Street can be extracted from the language of the ordinances, that right is merely permissive, and is not imposed upon the grantees as a condition. It is impossible to evolve a contract from the language of these ordinances. The langauge is that of a license to a riparian proprietor to construct private wharves in front of his private property under the regulations imposed. There is no provision which binds the city to do anything. There is no agreement to keep any driveway open or unobstructed, nor to refrain from establishing or changing the grade of Morrison Street from Front Street to the Willamette River. Plaintiffs contend that

they have the right, predicated upon these ordinances, to maintain open driveway and street wharves in perpetuity.

In Wabash R. R. Co. v. Defiance, 167 U. S., 88, the language of the Court is most appropriate to the situation here presented. The Court said: "The result would that, if the city should, in the growth of its population, become thickly populated in the neighborhood of these bridges, they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable. It is incredible, in view of the language of this ordinance, that the City could have intended, or the Railroad Company have expected, that the former relinquished forever the right to improve or change the grade of that street."

"Properly construed, this ordinance was merely a license to the company to build these bridges and to continue them until the City Council should conclude that it was for the public interest to change the grade of the street."

The decision just cited is particularly in point. Many of the questions decided are practically identical with the questions here presented; and upon the question of a contract arising from the terms of these ordinances, that decision is controlling to the purpose that no contract can be extracted therefrom. The City has promised nothing with relation to public or private wharves or access thereto. We are now considering the averments of the amended com-

plaint—the essential facts upon which they must rely—and not the assertions and contentions contained in their brief which present a situation entirely different from their amended complaint.

3. The Lower Floors of the Private Wharves Extend Over and on Morrison Street.

If there is one thing clearly and definitely alleged in the amended complaint it is that the extension of the lower floors into Morrison Street were laid upon the surface of that street. This is the averment concerning the construction of these wharves: "That under and in pursuance of said ordinances the respective predecessors in interest of plaintiffs in and to the property aforesaid constructed wharves in conformity with the provisions of said ordinances and the grades therein established, the said wharf constructed pursuant to Ordinance No. 2387 **covering the south half of said Morrison Street, being constructed over and upon the south half of said Morrison Street,** and on the east end of block 76, as provided in said ordinance; and the wharf constructed pursuant to said Ordinance No. 2273, **extending over and covering the north half of said Morrison Street** and on the east end of said south half of said block 76." (Abstract, p. 13.)

In every other part of the amended complaint where these wharves are referred to, and their position designated, they are described as being built "on and over" Morrison Street. (Abstract, pp. 13, 14, 23.) These averments make it clear that these

wharves, or extensions of the lower floor of private wharves, covered the surface of Morrison Street at and near its eastern terminus. And it is equally clear that these wharves were used by plaintiff and the general public as a public street and highway. There is no averment in the entire amended complaint, that these wharves extended into the Willamette River beyond the eastern terminus of Morrison Street. This silence is significant. The pontoons were evidently designed for that purpose. It can not now be contended that any part of these wharves or floor extended into the Willamette River. But plaintiffs make this assertion in their brief:

"But below the terminus of the street, extending to deep water lies an expensive structure that is private property. These wharves below the line of ordinary high water, which was the boundary of the Lownsdale Donation Land Claim, are built, as will be more fully shown below, with the consent of both the State and the City, and they are neither public wharves nor a property that can be taken or destroyed without compensation to its owners." (Plaintiffs' Brief, pp. 23, 24.)

This new structure emerged from the waters of the Willamette River since the hearing in the State Court. It is not mentioned in the amended complaint. This contention need only be stated to show its glaring departure from the facts alleged in the pleadings. It is contended in the brief that these wharves are "private property," while the amended

complaint shows that they "have been and are now improved and used as and the same are a public street and highway." (Abstract, p. 14.) The plaintiffs now insist that they are not "public wharves," but in their amended complaint they allege that they "have been used as a street or highway by the public." (Abstract, p. 14.) It is asserted that "below the terminus of the street, extending into deep water, lies an expensive structure that is private property." The amended complaint avers that one of these wharves covers "the south half of said Morrison street, being constructed over and upon the south half of said Morrison Street," and that the other extends over and covers "the north half of said Morrison Street." Will the Court consider these assertions of fact when they are discredited by the very averments which form the basis of this suit for injunction? This suit must be determined upon the record and the record facts cannot be enlarged or disputed. This case must be decided upon the assumption that the wharves on Morrison Street formed a part of that street and were open to general and public use.

4. Admissions Fatal to Plaintiffs' Case.

Plaintiffs generously disclaim any exclusive interest in or right to the use of the wharves in the street. We present their own language in this respect: "It is possible that in so far as the wharf at the end of the street extended above the line of ordinary high water it was merely a part of the street, and entirely free from private ownership." * * *

"In other words, while plaintiffs claim proprietary and vested rights in the wharves at the foot of the street, they do not dispute the rights of the public in the highway itself, or claim an exclusive use of the streets." * * * *

"So far as the street is concerned, and any part of the wharves that are actually upon the street, the plaintiffs claim no exclusive proprietary interest." * * * * (Plaintiffs' Brief, pp. 22, 23.)

This language is unequivocal, and there can be no controversy concerning these admissions. The plaintiffs do not claim any exclusive proprietary interest in the wharves constructed on the foot of Morrison Street. These wharves form a part of the highway, and plaintiffs do not dispute the interest of the public in the highway, nor claim any exclusive use of the street. In view of the averments of the amended complaint, to the effect that these wharves were constructed "on and over Morrison Street," and since, as we have elsewhere shown, these were not constructed beyond the eastern terminus of Morrison Street, these admissions dispose of plaintiffs' case. The disclaimer of any right or interest, different or superior to the general public, to the use of the wharves in Morrison Street, removes the only ground for injunction that plaintiffs could possibly have. Unless plaintiffs show clearly that they will suffer an injury different in kind from the injury suffered by the general public, they have no right at their private suit

to restrain the closing of the driveway. They do not show any such special injury. The fact that the closing of this driveway would exclude access by way of Morrison Street to the wharves at the foot of the street, or to their private wharves on either side of Morrison Street, or to the "expensive structure" beyond the eastern terminus of Morrison Street, if such structure ever existed, would not be an injury essentially different to that suffered by the public. It would be a mere difference of degree and not in kind. There could be no difference in kind unless the plaintiffs claimed some exclusive or proprietary right in the street, or to the use of the street at this point. But these special privileges are disclaimed, and they can present no ground for this equitable relief. The ordinances do not, in terms or in effect, give plaintiffs any proprietary interest. We invite the Court's attention to the decisions of both State Courts upon this point. (Abstract, p. 27, 41.)

Plaintiffs contend that the closing of the driveway is a public nuisance, causing a special damage to them. But the City in so doing is acting under legislative authority, and is merely bringing the surface of the street to the grade established by the Legislature. We find the following language of this Court in Transportation Company v. Chicago, 99 U. S., 635, 640, most appropriate to the present situation: "The answer to this is that the assumption is unwarranted. That cannot be a nuisance such as to give a common law right of action which the law authorizes. We refer to an action at common law such

as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals and which without authority would be nuisances, but in such a case, if the statute be such as the legislature had power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded."

The disclaimers made by plaintiffs and the language of the ordinances clearly show that they were not invested with any contract rights concerning Morrison Street or access to the lower docks or wharves. These considerations also dispose of plaintiffs' contention of reserved rights under the original dedication. The alleged reservations are all too uncertain to base such a claim upon, and we have already shown that the amended complaint presents a situation which excludes such a contention. There are no wharves to which these reservations could possibly apply. So we respectfully insist that viewed from every possible way, the existence of a contract between the City and plaintiffs' predecessors could not possibly be extracted from these ordinances.

II.

The amended complaint contains this averment:

"Plaintiffs further state that said wharf and wharfing privileges with the right of access to and egress from the same by way of Morrison Street, are property and property rights which they own, and that the same and the rights and privileges granted

under and by virtue of said ordinances are vested rights and of great value, and that to close up said opening in Morrison Street and so deprive them of the use and enjoyment of said wharf and wharfing privileges and render the same nearly or quite valueless would be to deprive plaintiffs of their property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and plaintiffs claim said wharf and wharfing privileges and their use and enjoyment with a right of ingress to and egress from the same as heretofore described under the provisions of said amendment."

1. Closing of Driveway Not a Taking of Property Without Due Process of Law.

The plaintiffs claim that their private wharf and wharfing privileges are property rights which cannot be taken without due process of law. The City does not attempt to take the plaintiffs' wharves or interfere with their wharfing privileges. These rights and interests will not be divested from the plaintiffs in any way. The only thing the City proposes to do is to close an open driveway in the center of Morrison Street in obedience to a public demand for the use of the entire surface of the street. The closing of this opening will prevent access to plaintiffs' lower docks along the old driveway through Morrison Street. Access to the upper dock can be had from the elevated surface of Morrison Street. Since the City makes no attempt to appropriate the

wharves or disturb the wharfing privileges, the question is narrowed to the right of access in this particular way. Have the plaintiffs the right to the maintenance of the driveway to the lower wharves through the opening on Morrison Street, and does this constitute property or property rights of which the City is attempting to deprive them without due process of law?

It must be conceded that the ordinances of the City regulating the construction of plaintiffs' wharves contain no reference to any driveway to the lower wharves, nor has the City undertaken in any way to keep this driveway open or unobstructed. It should be remembered that the plaintiffs are attempting to say what use a part of a public street shall be put to without any franchise in the same, and without any exclusive or proprietary interest in the use of the same.

When the Legislature of Oregon passed the act authorizing the construction of the Morrison Street bridge, it provided that the western approach to the bridge should conform to the established grade of Front Street. The construction company selected Morrison Street for the west approach of the bridge. The Supreme Court of Oregon has held that the provision of the act referred to effected a legislative establishment or change of grade of Morrison Street from Front Street to the Willamette River. As there was no exclusion of any driveway or opening in the terms of the act, the grade of the entire street between

Front Street and the river was established or changed to conform to the grade of Front Street. We assume that this Court will not disturb the construction placed upon the provisions of this act by the Supreme Court of Oregon. The construction of the local statutes is the peculiar function of the State Court. The grade of the street was therefore established by the Legislature without the interposition of the City of Portland. And the grade of the entire street was thus established. These facts must be accepted. The action of the City in decking over the open driveway is not a change or establishment of the street grade. It is merely bringing the surface of the street to the established grade. It is well settled and the authorities are uniform to the purpose that the property owner is not entitled to compensation for damages resulting from the establishment of the street grade, unless such liability on the part of the City or State is imposed by ordinance or statute.

2 Dillon Mun. Cor. (4th Ed.) Sec. 686.

The establishment of a street grade is not a taking of property without due process of law or without compensation. It is not a "taking" in the constitutional sense. In Transportation Company v. Chicago, 99 U. S., 635, this Court said: "Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of

the constitutional provision." Upon the question of compensation for damages sustained, it is said: "In such grants of power a right to compensation for consequential injuries caused by the unauthorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction." There can be no doubt that plaintiffs have no right to the maintenance of the roadway, nor to damages for the obstruction. They specially disclaim any exclusive right to its use. They have no rights superior or different to those of the public and cannot restrain its removal.

2. The Closing of the Driveway Not a Confiscation of the Wharves.

It is contended that the closing of this means of access will confiscate plaintiffs' property. It must be apparent at once to the Court that this would not be the effect of such closing. The plaintiffs are the owners of the property on either side of Morrison Street from Front Street to the river, and they can construct roadways through their own property to their wharves. They are not shut off from access by the closing of the roadway, and the wharves are not obstructed on the river, and it cannot be said that they will be confiscated by raising the surface of the street to the established grade.

Under the rule just announced plaintiffs would have no claim against the City, even if their property interests were confiscated by the establishment of the street grade. Establishing the street grade is not imposing an additional servitude on the street and the City is not responsible for consequential damages.

3. Wharves Were Not Constructed Under an Irrevocable License.

It is said that the wharves were built under a license from the city, and the owners having expended money on the faith of the license it is now irrevocable. A complete answer to this contention is that plaintiffs disclaim any right or easement in the street. They do not pretend to have any superior right in Morrison Street than the general public, and they certainly have no exclusive right therein. The doctrine of irrevocable parol licenses to which plaintiffs refer, is a license to exercise some exclusive proprietary right in the thing which is the subject of the license. The city is not endeavoring to deprive plaintiffs of their wharves. It is only attempting to improve the surface of its streets for the public benefit and convenience. Plaintiffs have no such interest in the public street as would induce a Court to restrain the City.

4. Agreement of Bridge Company to Leave Driveway Open Does Not Prevent the City From Closing It.

It is said that at the time the bridge was constructed, and again several years later, the bridge company agreed to leave an opening in the approach and so permit the use of the roadway leading from Front Street to the lower docks. The City having acquired the bridge through a legislative act of 1895, and a conveyance from the bridge company, it is alleged to have acquired no greater or superior rights than the bridge company then possessed, and purchased the said bridge and approaches subject to said agreement to keep the driveway open.

A bridge connecting public highways, and erected for the general use and accommodation of the public, or by a private corporation authorized to charge and collect tolls from persons using the same, is itself a public highway, and constitutes part of the highways with which it is connected.

> Pittsburg, etc. Ry. v. Point Bridge Co., 165 Pa. St., 37 (26 L. R. A., 323).

When this bridge was built it became a public highway, and the bridge company had no right to divert it from the public use.

Its sole right was to collect tolls thereon. But the approach was not even a part of the bridge. It became a part of Morrison Street—a public highway—and the bridge company had no proprietary interest therein. It was devoted to the public use the same as other streets and highways of the city. The bridge company had no right or authority to

make an agreement concerning this public way. It had no authority to make an agreement to keep this roadway open, or to maintain an unobstructed passage way to the lower wharves. The City is not bound by any such agreement, because the building company was never its predecessors in interest as to the approach, and the company had no authority to make such agreement.

There is another reason why such an agreement could not bind the City. Assuming, without admitting, that the company had a proprietary interest in both bridge and approach, and sold the same to the City as a man would sell a parcel of land to another, the alleged agreement or compromise was never a matter of record, and there is no averment that the City had actual or constructive notice of its existence. The city was an innocent purchaser in good faith, for a valuable consideration, and without notice of any existing agreement respecting the maintenance of the roadway in the center of the approach. In such a case the City would not be bound by such private agreement of which it had no notice either actual or constructive.

It can not be successfully urged that the City is estopped to close the opening on account of acquiescence in the use of the roadway or street wharves by plaintiffs for a length of time exceeding the period of limitations. This is so, for the sufficient reason that plaintiffs' user has never been adverse. The City did not grant their predecessors an exclusive

use of the streets. The ordinances authorizing the erection of the wharves, provided that "the whole of said passage way and all those portions of said wharf extending over and into the street shall be subject to regulation by the Common Council as a part of said street and sidewalk." And since the construction of said wharves the public has enjoyed the same rights and privileges on the driveway and wharves at the foot of Morrison Street, as were enjoyed by the plaintiffs. The fact that the plaintiffs used them more frequently, is merely a difference of degree. The criterion in these cases is the character of the use. If the user is adverse, continuous and notorious it may mature into an easement. If it be merely permissive and in common with the use of the general public it will never develop into an easement. The cases cited in support of plaintiffs' contention all refer to a user that was adverse and exclusive. The use of a street by a railroad is necessarily exclusive because the general public do not run cars and locomotives on the tracks. The cases of railway franchises have no application here.

We submit finally, that in the decision in the State Court the plaintiffs were not denied any of their constitutional rights. When the Court analyses the various questions presented in this case, it will find them all to be questions that are properly referable to the State Courts.

Respectfully submitted,

L. A. McNARY,
J. P. KAVANAUGH.
Attorneys for Defendants in Error.